

No. 15059

United States
Court of Appeals
for the Ninth Circuit

PANAVIEW DOOR & WINDOW CO., a Corporation,
Appellant,

vs.

REYNOLDS METALS COMPANY, a Corporation,
Appellee.

Transcript of Record
In Two Volumes

Volume I
(Pages 1 to 456)

Appeal from the United States District Court for the
Southern District of California
Central Division

FILED

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Affidavits of:	
<i>James M. Hairston</i> (Defendant's Exhibit B)	29
<i>O. J. Meyer, Jr.</i> (Defendant's Exhibit D) .	34
<i>Frank K. Miles</i> (Defendant's Exhibit A) .	12
<i>Harry M. Sargeant</i> (Defendant's Exhibit C)	17
<i>William O. Yates</i> (Defendant's Exhibit E)	22
Answer	9
Attorneys, Names and Addresses of	1
Certificate by Clerk	452
Complaint	3
Exhibits, Defendant's:	
A—Affidavit of <i>Frank K. Miles</i>	12, 291
B—Affidavit of <i>James M. Hairston</i>	29, 293
C—Affidavit of <i>Harry M. Sargeant</i>	17, 293
D—Affidavit of <i>O. J. Meyer, Jr.</i>	34, 294
E—Affidavit of <i>William O. Yates</i>	22
F—Letter, Dated April 6, 1955	298
G—Drawing of Horizontal Sliding Door ..	458

	INDEX	PAGE
Exhibits, Defendant's—(Continued):		
H—Print Which Incorporates the Change in the Weatherstripping Groove on Part 5X of the Panador	459	
I—Print of the Schlage Weatherstrip ...	460	
J—Print of Revision of the Weatherstrip- ping Groove	461	
K—Prints of Final Revisions Performed on the Sections for Panaview	462	
Exhibits, Plaintiff's:		
No. 1—Stipulation of Facts	39, 88	
2—Terms and Conditions Identical to the Acknowledgments	91	
5—Acknowledgment, Dated 4/7/48 ...	109	
6—Drawing of Horizontal Sliding Door	457	
11—Purchase Order No. 1691 of Wind- sor Manufacturing, Inc.	188	
12—Purchase Order No. 1539 of Wind- sor Manufacturing, Inc.	190	
13—Letter, Dated September 29, 1954.	193	
14—Memorandum, Dated November 26, 1954	198	
21—Acknowledgment of Purchase Or- der P-583	254	
24—Panador Cost Data	333	

INDEX

PAGE

Exhibits, Plaintiff's—(Continued):

25—Memorandum, Dated November 14, 1955	335
---	-----

Findings of Fact and Conclusions of Law	57
---	----

Judgment for Defendant and Order Denying Injunctive Relief	63
---	----

Notice of Appeal	65
------------------------	----

Objections to Defendant's Proposed Findings of Fact	41
--	----

Points and Authorities	45
------------------------------	----

Exhibit—Letter, Dated April 28, 1955.	55
---------------------------------------	----

Statement of Points on Appeal.....	455
------------------------------------	-----

Stipulation of Facts (Plaintiff's Exhibit No. 1)	39
--	----

Transcript of Proceedings	66
---------------------------------	----

Opening Statement on Behalf of the De- fendant	83
---	----

Opening Statement on Behalf of Plain- tiff	67
---	----

Witnesses, Defendant's:

Gunderson, Raymond

—direct	358
---------------	-----

Hairston, James M.

—direct	339
---------------	-----

—cross	347
--------------	-----

INDEX

PAGE

Witnesses, Defendant's—(Continued):

Meyer, Jr., Oscar J.

- direct 316, 392
- cross 316
- redirect 329

Miles, Frank K.

- direct 296
- cross 300

Sargeant, Harry M.

- direct 338

Yates, William O.

- direct 307
- cross 307

Witnesses, Plaintiff's:

Grossman, Abraham

- direct 93, 247, 380, 387
- cross 135, 389

Oldenkamp, Carl

- direct 159, 171
- cross 211
- redirect 215
- recross 219

Pinson, Louis

- direct 258, 365, 390
- cross 391

Reznick, Jerry

- direct 223

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In the United States District Court, Southern
District of California, Central Division

No. 18469-WM.

PANAVIEW DOOR & WINDOW CO., a Corpora-
tion,

Plaintiff,

vs.

REYNOLDS METALS COMPANY, a Corpora-
tion,

Defendant.

COMPLAINT

(Breach of Contract; Breach of Confidential Re-
lationship; Unfair Competition; Injunction.)

Plaintiff alleges the following causes of action:

First Cause of Action (Breach of Contract)

I.

Plaintiff is a corporation duly organized and ex-
isting under the laws of the State of California
with its principal place of business in Los Angeles
County. According to plaintiff's information and
belief, defendant is a corporation organized and
existing under the laws of Delaware and having
a regular and established place of business in this
judicial district.

II.

The jurisdiction of this court is founded upon
diversity of citizenship between the parties and
upon the fact that the matter in controversy, ex-

clusive of interest and costs, exceeds the sum of \$3,000.00. [2*]

III.

On or about June 30, 1954, plaintiff and defendant entered into a number of contracts whereby defendant, in return for certain moneys, paid or to be paid by plaintiff to defendant, agreed to make certain extrusion dies for plaintiff and to keep such dies for plaintiff's sole and exclusive use. Said contracts are evidenced and embodied in part in a number of "Original Invoices," "Acknowledgments," and other standard forms used by defendant in the usual course of its business. The clearest written statement of defendant's commitment on the above dies is contained in Paragraph 11 of the "Terms and Conditions" of defendant's Acknowledgments, which reads as follows:

"Equipment. Any equipment (including jigs, printing plates or cylinders, dies and tools, etc.) which Seller constructs or acquires specifically and solely for use on Buyer's order shall be and remain Seller's property and in Seller's sole possession and control. Any charges made by Seller therefor shall be for the use of such equipment only. When Seller has not accepted orders from Buyer for product to be made with such equipment for a period of one year, Seller may then require Buyer to give disposition of the said equipment, and in the event such disposition is not given within thirty (30) days after such demand, Seller

may, without liability, make such disposition as it sees fit or may store the equipment for the account of Buyer, charging Buyer for the storage charges."

IV.

On or about December 1, 1954, and continuing until the date hereof, defendant having made said dies pursuant to said contracts, and all conditions precedent having occurred or been performed, defendant violated its contracts with plaintiff by using [3] said dies to make extrusions for plaintiff's competitors, Windsor Sales, Inc.; Windsor Supply, Inc., and Windsor Manufacturing, Inc., and by delivering such extrusions to such competitors within this judicial district, all without plaintiff's knowledge, approval, or consent.

V.

Plaintiff ordered said dies in order to get extrusions for use in constructing aluminum-sash-and-frame sliding doors, which plaintiff sold under the name "Panador." By violating its contracts as above set forth, defendant made it possible for plaintiff's said competitors to divert large amounts of business from plaintiff; to confuse the buying public as to the source of such doors; and to use extrusions which were needed by plaintiff for its own production, but were diverted by defendant to plaintiff's competitors, though frequently promised by defendant to plaintiff and sorely needed by

plaintiff; all to the damage of plaintiff in the sum of \$250,000.00.

Second Cause of Action
(Breach of Confidential Relation)

VI.

Plaintiff realleges the matters set forth in its First Cause of Action above.

VII.

During the two years ending June 30, 1954, plaintiff conceived, developed, and engineered a moderate cost sliding door, to which it applied the trademark of "Panador." Such door included an aluminum frame and an aluminum sash, both of which were constructed of extrusions of various intricate shapes. The design of such extrusions was conceived and reduced to blueprint form by plaintiff.

VIII.

On or about June 30, 1954, plaintiff submitted such blueprints to defendant in trust and confidence for the purpose of [4] facilitating defendant's construction of dies for fabricating the above-mentioned extrusions.

IX.

At the time of submitting such blueprints to defendant, both plaintiff and defendant knew and relied upon the fact that, according to the universal custom of the aluminum extrusion industry, the supplier of extrusions must keep confidential all

information disclosed to it by its customers, whether in blueprint form or otherwise, and must use dies paid for by one customer only for that customer's order.

X.

On or about December 1, 1954, and continuing until the date hereof, defendant wilfully violated plaintiff's trust and confidence in defendant by using said information and dies to make and process extrusions for its own account and for plaintiff's competitors named above; all to the damage of plaintiff in the sum of \$250,000.00 as set forth in Paragraph V above.

Third Cause of Action (Unfair Competition)

XI.

Plaintiff realleges all the matters set forth above in its First and Second Causes of Action.

XII.

On or about December 1, 1954, and continuing until the date hereof, defendant unfairly competed with plaintiff by entering into the business of making and selling for its own account extrusions from the dies paid for by plaintiff; revealing to plaintiff's said competitors the design of plaintiff's door and selling to them the extrusions needed therefor (all of which were made from the dies paid for by plaintiff); and financing plaintiff's above competitors by advancing to them credit in the amount of approximately \$67,000.00, which financing was

needed by said competitors in order for them to operate. All of said acts were [5] done without plaintiff's knowledge, approval, or consent, and their effect was to damage plaintiff in the sum of \$250,000.00 as described in Paragraph V above.

XIII.

Each and every act done by defendants, as aforesaid, was done maliciously and with intent to vex, annoy, and injure the plaintiff in its business, by reason whereof the plaintiff is entitled to punitive and exemplary damages under California Civil Code Section 3294 in the amount of \$100,000.00.

XIV.

Defendant is continuing to sell and deliver to plaintiff's said competitors extrusions made from the dies paid for by plaintiff, and defendant is about to sell and deliver such extrusions to a new competitor, to wit, W. P. Fuller & Co., a California corporation, according to the information and belief of plaintiff. As alleged above, such actions by defendant are in violation of the confidential relation between plaintiff and defendant, and are in unfair competition with plaintiff.

XV.

If defendant's actions are allowed to occur and continues, plaintiff's business will be irreparably injured by the confusion created in the minds of the buying public and by the diversion of orders from plaintiff to others. Therefore plaintiff is entitled to an injunction to prevent defendant from continuing such actions.

Wherefore, plaintiff demands judgment against defendant in the sum of \$250,000.00 actual damages, plus interest, \$100,000.00 punitive damages, and costs, and an injunction against defendant's continuing to sell extrusions made from the dies paid for by plaintiff, and from use of any dies made from designs furnished by plaintiff, and from use of any dies designed to make articles similar to those made with the aforesaid dies paid for by plaintiff.

THOMAS P. MAHONEY,

MACBETH & FORD,

By /s/ NORMAN MACBETH,
Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed July 27, 1955. [6]

[Title of District Court and Cause.]

ANSWER

Defendant above named answers plaintiff's Complaint on file herein as follows:

Answer to First Alleged Cause of Action

I.

Answering Paragraphs II, III, IV and V thereof, defendant admits that the amount in controversy exceeds the sum of Three Thousand Dollars (\$3,000.00). Defendant further admits that it re-

ceived from plaintiff and acknowledged receipt of orders from plaintiff for the manufacture of certain aluminum extrusions, and that it made the dies necessary for the manufacture of said extrusions. Defendant further admits that its acknowledgment of order contained and contains, among other things, in paragraph 11 of the "Terms and Conditions" thereof, the language set forth at page 2, lines 13 to 27, inclusive, of plaintiff's Complaint. Save and except as herein expressly admitted, defendant denies [8] generally and specifically each and every allegation contained in said paragraphs, and in each of them.

Answer to Second Alleged Cause of Action

I.

Answering Paragraph VI thereof, defendant refers to its Answer to plaintiff's first alleged cause of action and by this reference incorporates the same herein as though fully set forth.

II.

Answering Paragraphs VII, VIII, IX, and X thereof, defendant admits that some time during the year 1954 plaintiff submitted to defendant certain drawings for the purpose of showing defendant the type of extrusions plaintiff wished to purchase from defendant. Save and except as herein expressly admitted, defendant denies generally and specifically each and every allegation contained in said paragraphs, and in each of them.

Answer to Third Alleged Cause of Action

I.

Answering Paragraph XI thereof, defendant refers to its Answer to plaintiff's first and second alleged causes of action and by this reference incorporates the same herein as though fully set forth.

II.

Answering Paragraphs XII, XIII, XIV and XV thereof, defendant denies generally and specifically each and every allegation contained in said paragraphs.

Wherefore, defendant prays judgment as follows:

1. That plaintiff taking nothing by reason of its Complaint on file herein;
2. For defendant's cost of suit incurred herein; and
3. For such other and further relief as to the Court may seem proper.

ADAMS, DUQUE &
HAZELTINE,

By /s/ HENRY DUQUE,

/s/ LAURENCE T. LYDICK,
Attorneys for Defendant,
Reynolds Metals Company.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 2, 1955. [9]

DEFENDANT'S EXHIBIT A

[Title of District Court and Cause.]

AFFIDAVIT OF FRANK K. MILES

State of California,
County of Los Angeles—ss.

Frank K. Miles, being first duly sworn, deposes and says:

I am a resident of the County of Los Angeles and I am employed by defendant, Reynolds Metals Company, in the capacity of Regional Credit Manager, which position I have occupied for the last six years. As Regional Credit Manager I have jurisdiction over the nine Western States and Alaska and Hawaii. I have been employed by Reynolds Metals Company in a credit capacity for the past eight and one-half years.

My duties as Regional Credit Manager are to approve all credits within the region of prospective customers and of present customers, and in addition to this, I also handle all of the final collections of the Company in this region. It is my duty to determine whether or not Reynolds Metals Company is to extend credit [11] to any particular customers in this region and the terms and conditions of such credit extension, and my decision in these matters is final insofar as it relates to the extension of credit to this Region.

I am acquainted with Panaview Door & Window Co. and with the principals of that corporation, Mr.

Abe Grossman and Mr. J. L. Reznick. I first became acquainted with Mr. Grossman and Mr. Reznick in connection with another corporation of which they were the principal operators which name was Glide Windows, Inc., to which corporation Reynolds Metals, with my approval, had extended credit commencing several years ago. The last time we extended credit to Glide Windows, Inc., was in early 1953, at which time they were unable to pay their bill. After that time no further orders were entered in the name of Glide Windows, Inc., and I accepted notes from Glide Windows, Inc., for the balance due on their account, said notes being in the total sum of Sixteen Thousand Eight Hundred Twenty-four Dollars and Seventy-two Cents (\$16,824.72). To date there still remains a balance due and payable on said notes of Four Thousand Dollars (\$4,000.00).

In early 1954, Mr. Grossman and Mr. Reznick again commenced placing orders with Reynolds Metals Company under the corporate name of Panaview Door & Window Co., a corporation which apparently had been recently formed. The first order was placed by Panaview with Reynolds Metals during the month of April, 1954, and was an order for extrusion shapes in the total sum of approximately Sixteen Thousand Dollars (\$16,000.00). The order was approved by me during the month of May, 1954, after having reviewed the December, 1953, Balance Sheet of Panaview which showed working capital of One Hundred Sixty-four

Thousand One Hundred Seventy-four Dollars (\$164,174.00).

Thereafter, further orders for extrusion shapes were approved for credit by me on the following dates in the following [12] amounts: July, 1954, approximately Seventeen Thousand Eight Hundred Dollars (\$17,800.00); October, 1954, approximately Twenty Thousand Dollars (\$20,000.00); February, 1955, approximately Sixteen Thousand Seven Hundred Sixty Dollars (\$16,760.00). On April 26, 1955, I advised our sales personnel I would be unable to accept and enter any new orders from the Panaview Door & Window Co. until their present past due account, amounting to approximately Fifteen Thousand Fifty-five Dollars (\$15,055.00) and the Glide Window account amounting to Twele Thousand Dollars (\$12,000.00) had been paid in full. This decision was based on slow payment in the past and a new Balance Sheet furnished by Panaview, dated February 28, 1955, showing a deficit working capital position of Sixty-one Thousand Six Hundred Thirty-one Dollars (\$61,631.00). We did not hold shipments on their order approved in February, 1955, and in this connection, and contrary to the allegations contained in the Complaint on file herein which I have read and the Complaint and Affidavit on file herein which I have read, shipments were continued to Panaview Door & Window Co. in May, June and July of 1955 on the order entered in 1955. In addition, I have offered to extend further credit to the Panaview Door & Window Co. whenever their account is paid in full

and their financial statement justifies it. My records of this date indicate the current account of Panaview shows a debit balance of Six Thousand Seventy-five Dollars and Sixty-six Cents (\$6,075.66) and the current account of Glide Windows, Inc., shows a debit balance of Four Thousand Dollars (\$4,000.00). A Twenty-three Dollars and Seventy Cents (\$23.70) check received from Glide Windows, Inc., this month was returned to us marked by the bank "Not Sufficient Funds."

It is not true, as is alleged in the Complaint, that Reynolds Metals Company ever financed any of the competitors of Panaview Door & Window Co., which are mentioned in the Complaint, to wit, Windsor Sales, Inc.; Windsor Supply, Inc., and Windsor [13] Manufacturing, Inc. Credit was extended on orders from Windsor Supply, Inc., by Reynolds Metals Company, based on financial statement furnished by Windsor Supply, Inc., as of November 30, 1954, showing working capital, Eighty Thousand Two Hundred Dollars (\$80,200.00), and a net worth of One Hundred Twenty-six Thousand Three Hundred Dollars (\$126,300.00). In addition, we requested and received a guarantee of the Windsor Supply account from Associated Finance Company, which furnished us with their financial statement as of September 30, 1954, showing total assets One Million Four Hundred Sixty Thousand Four Dollars (\$1,460,004.00); total liabilities, Eight Hundred Ninety-four Thousand Four Hundred Fifty-nine Dollars (\$894,459.00); capital and sur-

plus of Five Hundred Sixty-five Thousand Five Hundred Forty-five Dollars (\$565,545.00). The extension of credit and the approval of orders by me to Windsor was done in the normal course of business and as a routine transaction, and was based entirely upon the financial condition of that company and of its guarantor, Associated Finance Company, at the time of entering such orders. The credit which was extended had no relation whatsoever to any accounts we had had in the past with Panaview Door & Window Company, and in extending and approving credit to Windsor I did not have in mind at any time, nor did I consider, any of the previous dealings which we had had with Panaview. They were, so far as I was concerned, two completely unrelated transactions. Contrary to the allegations contained in the Complaint, the extension of credit and the approval of credit by me to Windsor was not done maliciously, or with any intent on my part or on the part of Reynolds Metals Company to vex, annoy or injure plaintiff in its business in any manner whatsoever.

/s/ FRANK K. MILES.

Subscribed and sworn to before me this 14th day of September, 1955.

[Seal] /s/ GRACE M. CRARY,

Notary Public in and for Said
County and State.

My Commission Expires Jan. 26, 1957.

[Endorsed]: Filed September 14, 1955.

Received in evidence November 22, 1955. [14]

DEFENDANT'S EXHIBIT C

[Title of District Court and Cause.]

AFFIDAVIT OF HARRY M. SARGEANT

State of California,
County of Los Angeles—ss.

Harry M. Sargeant, being first duly sworn, deposes and says:

I am a resident of the County of Los Angeles and am employed by defendant, Reynolds Metals Company, as Regional General Sales Manager, Parts Division. My duties in this capacity are to promote the sale of both building products and industrial parts in Region 1, which is composed of the eleven Western States.

I have been continuously employed by Reynolds Metals Company since 1937. For the first few years with the Company I worked in various departments in the manufacturing end of the business, such as Production, Chemical Laboratory, Production Manager, Assistant to the Vice President in charge of the Parts Division, for the purpose of learning the business and the [16] Company's operation. In 1943 I was transferred from manufacturing to sales in the Buffalo, New York, sales area. In 1947 I was transferred to Los Angeles as Divisional Sales Manager, and in 1951 I was promoted to my present capacity. During the years that I have worked for Reynolds Metals Company I have become well acquainted with the customs and usages in its busi-

ness and in the business of its competitors and customers both as to manufacturing and sales.

The selling operation of Reynolds Metals Company embraces two divisions, namely, Parts Division and General Sales Division. The function of the Parts Division is to promote the sales of both building products and industrial parts. The function of the General Sales Division is to promote the sales of those products generally referred to as mill products as well as consumer sales, such as "Reynolds Wrap." Included in the industrial parts category are basically those items which we produce from blueprints or drawings according to the customer's specifications, such as washing machine tubs, refrigerator parts, automotive parts, residential window parts, aluminum door parts, etc.

In my capacity as General Sales Manager of the Parts Division, I had no dealings with the Panaview Door & Window Co. people who apparently came to us for the manufacture of extruded shapes and, therefore, cannot make any statements as to what transpired between Reynolds Metals Company and Panaview Door & Window Co. The dealings with Panaview Door & Window Co. were carried on by the personnel of the General Sales Division. I did, however, have dealings with Windsor Supply, Inc., and particularly with Mr. R. G. Gunderson and Mr. C. A. McLin. Windsor was one of the suppliers for W. P. Fuller & Co. for both sliding doors and sliding windows and Reynolds Metals Company was Fuller's supplier of both casement and sliding windows. I renewed my acquaint-

ance with Mr. Gunderson at the suppliers' meeting held yearly by W. P. [17] Fuller & Co. Since I had met Mr. Gunderson through this medium, he called me on the telephone and invited me to lunch some time during the summer of 1954. I met Mr. McLin for the first time at this luncheon meeting. At this meeting Messrs. Gunderson and McLin proposed to sign a materials contract with us for not only their requirements of extruded shapes, but aluminum coil stock as well. The extrusions were required for the door that Windsor was selling to Fuller, and the coil material was for another company of Mr. McLin's which produced aluminum tile. After some discussion, it was determined that Windsor, rather than purchasing extruded shapes only, would buy from us substantially all of the aluminum component parts necessary in the assembling of their sliding door, and that Windsor, using the other component parts which it obtained from other sources, such as hardware, bumpers, vinal, weather stripping, rollers and screws, would assemble and package their own door.

Subsequent to this luncheon meeting, Windsor submitted to us a sample sliding door which they were selling to W. P. Fuller & Co. The door was dismantled by our manufacturing people and the component parts which we were to make were priced by us on that basis according to the sample which had been submitted. Along with the sample of the sliding door, Windsor also submitted samples of their sliding window, as well as samples for tub enclosures and shower doors. In accordance with

our custom, I then prepared quotations for each component that we were to supply, as well as a quotation to cover the tooling costs at our Parts Division plant in Phoenix, Arizona. The quotations were submitted to Windsor and thereafter they placed an order with us for the manufacture of the aluminum components to be assembled by them in the manufacturing of the Windsor sliding door.

Contrary to the allegations in plaintiff's Complaint and Affidavit, which I have read, I at no time in any of my dealings [18] with Windsor, nor did anyone else of our organization so far as I am able to ascertain, ever revealed to them any information with respect to the shape or design of the product of any customer, including Panaview Door & Window Co., all of our quotations having been based upon the sample door given to us by Windsor representatives. Furthermore, at no time have I, nor did anyone else of our organization, sought to sell or deliver extrusions for sliding glass doors to W. P. Fuller & Co.

In all of the years during which I have been employed by Reynolds Metals Company, I know of my own knowledge that it has never manufactured any sliding doors, and at no time during the period referred to in plaintiff's Complaint has Reynolds Metals Company been in competition with plaintiff or any other company in the manufacture and sale of sliding doors.

In my experience in the building products field, there is no basic difference in sliding doors regard-

less of the manufacturer, nor is there anything unique in their design—all are essentially the same. If Reynolds Metals Company were prevented from or enjoined from using any dies which would create or which are capable of producing articles which are the same as or similar in size and shape to the articles produced from the dies which were made by Reynolds Metals Company for the production of extruded shapes ordered by Panaview Door & Window Co., Reynolds Metals Company would suffer irreparable injury in that it would be prevented from carrying on business with many other companies and industries for whom at the present time extruded articles similar in size and shape to the articles produced from the aforesaid dies are manufactured. Furthermore, in view of the present lack of availability of aluminum many other companies and industries dependent upon the Reynolds Metals Company for extrusions would be substantially and irreparably injured.

/s/ HARRY M. SARGEANT. [19]

Subscribed and sworn to before me this 14th day of September, 1955.

[Seal] /s/ GRACE M. CRARY,
 Notary Public in and for Said
 County and State.

My Commission Expires Jan. 26, 1957.

[Endorsed]: Filed September 14, 1955.

Received in evidence November 22, 1955. [20]

DEFENDANT'S EXHIBIT E

[Title of District Court and Cause.]

AFFIDAVIT OF WILLIAM O. YATES

State of California,
County of Los Angeles—ss.

William O. Yates, being first duly sworn, deposes and says:

I am a resident of the County of Los Angeles and am employed by defendant, Reynolds Metals Company, as Regional General Manager, Pacific Coast Region, which comprises ten Western States, Hawaii and Alaska. My duties in this capacity are to supervise sales of industrial mill products, packaging products, and consumer products. I have nothing to do with the Parts Division, my work being with the General Sales Division.

I have been continuously employed by Reynolds Metals Company since 1940. I first started with Reynolds Metals Company in the Chemical Laboratory in Louisville, Kentucky, and then held various manufacturing and technical jobs until 1944, at which [22] time I was promoted into the Sales Division and transferred to Cleveland, Ohio, as Industrial Products Salesman. After selling in Cleveland for one and one-half years, I was promoted to District Sales Manager in Akron, Ohio. In 1949, I was promoted to Divisional Sales Manager in Cleveland. In 1951, I was promoted to Regional Industrial Sales Manager, Pacific Coast Region. In 1954,

I was promoted to Regional General Sales Manager, Pacific Coast Region. During the years I have worked with Reynolds Metals Company in its various departments and divisions, I have become well acquainted with the customs and usages of its business and trade and in the business and trade of its competitors and customers, both as to manufacturing and as to sales.

In my capacity as Regional General Sales Manager, I first came in contact with Panaview Door & Window Co. in the early part of 1954. At that time, I called on Mr. J. L. Reznick who was a former officer of Glide Windows, Inc., and who was also then an officer of the recently formed corporation, Panaview Door & Window Co. The purpose of my call on Mr. Reznick at that particular time was to inquire as to the reason why a long overdue payment of \$16,000, which Glide Windows, Inc., owed Reynolds Metals Company for extruded shapes previously delivered to Glide Windows, Inc., had not been met. Mr. Reznick discussed the Glide Windows financial situation with me, and after that subject was exhausted, our discussion turned to the Panaview Door & Window Co. and its business operation. Mr. Reznick informed me that Panaview was desirous of having some extruded shapes manufactured in connection with a sliding door which it was producing and wondered whether Reynolds Metals Company would be interested in manufacturing the extruded shapes required. I told him that Reynolds Metals Company would be interested, assuming that the credit of Panaview was approved

by the Reynolds Metals Company Credit Department and also that Glide Windows would execute promissory notes for [23] unpaid balance due on the extrusions previously delivered to Glide Windows by Reynolds Metals Company. Mr. Reznick agreed to have the promissory notes executed and to submit a financial statement to our Credit Department, sample pictures of the sliding door assembly, and an order for extruded shapes.

In due course, an assembly picture of a sliding door was received by us from Panaview, and the assembly picture was processed by my Extrusion Engineering Department of which Mr. O. J. Meyer is in charge. The assembly picture, which was shown to me, was a full-scale cross-section picture of a proposed sliding door which contained some details as to dimensions and as to the specific component sections of the door. Thereafter, the Extrusion Engineering Department made the necessary detailed section drawings and certain of these sections, upon submission to our extrusion mill, required modifications, which modifications were incorporated in the individual section drawings. In addition to this, I am informed that section assembly tolerances were computed by Mr. Meyer's department and added to the section drawings to insure that the sections were assembled properly and that the door would work. After the modified drawings were agreed to by Panaview, they were submitted to the mill for the making of the die design drawings. Because of the modifications and

the assembly tolerances which were computed by us, it was necessary to produce new dies, and dies were thereafter made and Panaview was charged a nominal service charge for the use of these dies.

By written agreement with Panaview, as is usual and customary in our dealings with customers for whom extruded shapes are made, the dies which we made were to remain the property of Reynolds Metals Company and under Reynolds Metals Company's sole possession and control, and Panaview simply acquired a priority on the use of the dies whenever its orders for extruded shapes were received by us. At no time did we agree by written contract, [24] orally or otherwise, that the dies which were made to produce extruded shapes for Panaview would be used exclusively or solely to produce extrusions for Panaview, as is erroneously alleged in Paragraph III of plaintiff's Complaint, which I have read. While it is the custom in the aluminum extrusion industry for the manufacturer of extrusions to make the dies which will produce the extruded shapes requested by the buyer, they do not necessarily restrict that die to the exclusive use of that particular customer. There are numerous cases in the aluminum extrusion manufacturing business where there are many users of identical or similar extruded shapes. The extruder company makes no inquiries as to how the desired shape is developed or to whom the design or idea therefor belongs, and it would be impossible for it to determine whether or not a particular shape or design has been pre-

viously produced by someone else. As in the case here in question, we made many modifications of the original assembly picture which was submitted to us by Panaview ,and it was not until after such modifications were made that the ultimate design for the die was developed.

There are to my knowledge certain situations where the use of dies are restricted to the particular buyer for whom the dies are made, but these are cases of classified or secret military products or highly specialized, technical, or unique equipment. This was not the case in connection with the Panaview assembly picture, which was the usual routine sliding door assembly. When I first talked with Mr. Reznick about manufacturing extruded shapes for Panaview, nothing was ever then said by him, or at any later date, as to the assembly or design being confidential in nature or that it was unique or out of the ordinary or patented. Contrary to the allegations contained in the Complaint, there was no agreement between Reynolds Metals Company and Panaview to keep any information confidential nor, so far as I know, would it have been [25] customary in the trade to do so unless specifically instructed by the buyer.

On reading plaintiff's Complaint, it is apparent that plaintiff has misinterpreted the meaning of the phrase, "solely for use on buyer's order," which appears in Paragraph 11 of the Terms and Conditions. By custom and usage in the aluminum extrusion industry, this phrase means that the dies which

are made to produce extruded shapes for a particular buyer shall be used solely on orders for extrusions placed by that buyer with seller so long as that particular buyer has an order in process. In other words, when the buyer has an order in process, the dies which were made to fill that order shall be used solely for the purpose of completing that order at that time and shall not be used for any other buyer's order at that time. If it had been the intention of Reynolds Metals Company to use dies exclusively for extruded shapes for a particular buyer and for no other, it would have stated that they would be used solely upon buyer's orders and for no others. This is not the fact and is not what the Terms and Conditions say.

I know of my own knowledge many instances where customers have brought to Reynolds Metals Company doors or windows which have been produced and manufactured, respectively, by other extruders and window manufacturers and have requested Reynolds Metals Company to supply them with identical extruded shapes contained in such doors or windows, which Reynolds Metals Company has done and which practice is followed so far as I know by every other company in the industry.

If Reynolds Metals Company were enjoined from using any of its dies which were made by it to produce extruded shapes for Panaview Door & Window Co., such an injunction would be contrary to and violate the custom and usage in the aluminum extrusion industry and would cause Reynolds Metals

Company to suffer [26] irreparable injury in that it would be prevented, not only in the case of Panaview, but in the case of all of its other customers from following the custom and usage of the trade in using all of the dies which it owns. In addition, if Reynolds Metals Company were enjoined from using any dies which would create or which are capable of producing articles which are the same as or similar to the size and shape to the articles produced from its dies which it made for the production of extruded shapes ordered by Panaview, Reynolds Metals Company would suffer irreparable injury in that it would be prevented from carrying on business with many other companies and industries for whom at the present time extruded articles similar in size and shape to the articles produced from the aforesaid dies are manufactured.

/s/ WILLIAM O. YATES.

Subscribed and sworn to before me this 15th day of September, 1955.

[Seal] /s/ GRACE M. CRARY,
 Notary Public in and for Said
 County and State.

My Commission Expires Jan. 26, 1957.

[Endorsed]: Filed September 15, 1955.

Received in evidence November 22, 1955. [27]

DEFENDANT'S EXHIBIT B

[Title of District Court and Cause.]

AFFIDAVIT OF JAMES M. HAIRSTON

State of California,
County of Los Angeles—ss.

James M. Hairston, being first duly sworn, deposes and says:

I am a resident of Phoenix, Arizona, and am employed by the Reynolds Metals Company in the capacity of Plant Controller of the Phoenix Extrusion Plant. I have been employed in this capacity for more than two years. I first came to work for Reynolds Metals Company in 1946 in Sheffield, Alabama, and was employed at that time as Cost Accountant. In October, 1947, I was transferred to the Sheffield Parts Division Plant as Chief Cost Accountant. At the Sheffield Parts Division Plant I was Cost Accountant for approximately seven months, at which time I was appointed Plant Accountant, serving in that capacity until 1950. I was then transferred to the Reynolds Alloys Company, a wholly-owned [29] subsidiary of Reynolds Metals Company, as Chief Cost Accountant. I served in that capacity until May 15, 1953, and then was transferred to my present location in my present position as Plant Controller.

In the years I have worked for Reynolds Metals Company, I have become well acquainted with the customs and usages of its business with relation to

the costs and manufacturing of extrusions. I am also well acquainted with the customs and usages of the extrusion trade generally and with the practices followed not only by Reynolds Metals Company, but by its competitors regarding the preparation and use of dies for the manufacture of such extrusions.

In the normal course of our business in producing extrusions, we receive from our customers a design or sample for an extruded shape which we contract to supply. At the outset, the Extrusion Engineer in our outlying regional sales offices converts the customer's drawing and/or sample to a cross-sectional configuration with full descriptive dimensions, tolerances, etc. Once the contract of sale has been made, a standard contract order form is prepared along with the necessary extrusion print or sketch. This is submitted through our central production control division to our plant production control division. Upon receipt of the order at the plant level, the extrusion drawing or print is released to the plant tool design department, where the necessary engineering determinations and drawings are made for the manufacture of the extrusion tools. Once the tool design is completed, a tool production order, designated in our plant as a "T" order, is issued releasing the tool design to the tool or die manufacturing department. No die may be fabricated in our die manufacturing department without a "T" order. After the manufacture of the die, which usually requires from one to three weeks,

the actual manufacture of the extruded shape is entered into mill production schedule.

Metal is processed through our mill according to the [30] instructions contained in a master lot ticket. This master lot ticket contains all of the instructions required or necessary to produce one item of a customer's order. There may be several items to a customer's order, and there may be several master lot tickets to each item, depending upon the total quantity to be produced. This master lot ticket represents the schedule for the production of a shape with a given extrusion section number. This same ticket provides a complete list of operations to be performed, the finished dimensions of the product, and the expected yield from the metal allotted to and entered on that particular lot. The metal is then processed through the mill and inspected and packed following the instructions contained in the master lot ticket and is then shipped to the customer.

The history of the Panaview Door & Window Co. orders followed the above course. Its original order, which was received at the plant about the middle of May, 1954, contained several items to be produced from nine different section drawings which had been prepared by the Extrusion Engineering Department in the Los Angeles Regional Sales Office. The required dies and tools were fabricated by our usual manner, and the actual manufacture of the extruded shapes began early in the month of June. 1954.

At no time in any stage of the processing of the Panaview order was there any indication of any kind or nature whatsoever that the work being performed for Panaview or the designs of such work were of a secret, confidential, or unique nature. So far as we were concerned, it was a strictly routine order.

Some time during the month of November, 1954, we received through the Parts Division Plant of the Reynolds Metals Company at Phoenix a production order for the manufacture of extrusions to be further fabricated by the Parts Division Plant and, in turn, shipped to Windsor Supply, Inc., as fabricated parts. The material required by this production order was to be manufactured [31] under eight new extrusion section numbers, numbered 13250 through 13257, inclusive. In the processing of this production order, it was determined that the sections called for were the same as the sections as produced for Panaview. Therefore, following the normal and customary usage and practice of not only Reynolds Metals Company, but to the best of my knowledge of the extrusion industry generally, our existing die tools made under "T" orders, numbered 3318 through 3325, inclusive, which had been previously used by us in producing extruded shapes, numbered 10414 through 10421, inclusive, for Panaview, were now used by us to produce the extrusions called for by the Windsor order.

Contrary to the statement contained in Paragraph V of plaintiff's Complaint, which I have

read, it is not true that extrusions were diverted by us to Windsor Supply, Inc., or any other competitor of plaintiff. In using our existing die tools to produce extruded shapes called for by the Windsor order, there was at no time any interference with any of the existing Panaview orders or with the production schedule of any Panaview orders, nor was there at any time any diversion of extrusions from Panaview for the benefit of Windsor. At no time were the existing die tools above referred to used in such a manner as to in any way harm or damage Panaview.

Contrary to the allegations contained in Paragraphs IX and X of the plaintiff's Complaint, and irrespective of the alleged universal custom of the aluminum extrusion industry mentioned in those paragraphs, at no time, to the best of my knowledge, did Reynolds Metals Company divulge to Windsor or to any other competitor of Panaview any information which it received in blueprint form, or otherwise, from Panaview. The extruded shapes which were ordered by Windsor from Reynolds Metals Company were brought to Reynolds Metals Company in the form of an assembled sliding door which had been for sale on the open market for some [32] months prior to its submission to Reynolds Metals Company.

/s/ JAMES M. HAIRSTON.

Subscribed and sworn to before me this 15th day of September, 1955.

[Seal] /s/ GRACE M. CRARY,
Notary Public in and for Said
County and State.

My Commission Expires Jan. 26, 1957.

[Endorsed]: Filed September 15, 1955.

Received in evidence November 22, 1955. [33]

DEFENDANT'S EXHIBIT D

[Title of District Court and Cause.]

AFFIDAVIT OF O. J. MEYER, JR.

State of California,
County of Los Angeles—ss.

O. J. Meyer, Jr., being first duly sworn, deposes and says:

I am a resident of the County of Los Angeles and am employed by defendant, Reynolds Metals Company, as Regional Extrusion Engineer. My duties in that capacity are: (1) To assist various Company representatives in their contracts with the aircraft companies, architects, window and door manufacturers and various other customers where technical counsel is required; (2) To investigate product quality complaints, and (3) To supervise the operation of the Los Angeles Extrusion Engineering Department. This includes processing of prospective

customers' inquiries requiring pricing quotations, suggested design ideas for a particular end use, solution of critical tolerance problems, and [35] extrusion drawings on finalized shapes ready for ordering and manufacturing. On occasions I create designs for extrusions from my own ideas or from suggestions made by prospective customers.

Normal procedure for handling new extrusion section drawings is to have the customer approve a print of same, which is forwarded to the extrusion mill for record purposes.

I have been continuously employed by Reynolds Metals Company since leaving Purdue University in 1948. My first employment with the Company was as a draftsman in the Extrusion Department at the General Sales Office in Louisville, Kentucky. Thereafter, I became Administrative Assistant to the Architectural Market Division in Louisville, Kentucky, where my principal duties consisted of the designing of extruded sections for customers and prospective customers in the architectural field. After additional training at the Phoenix, Arizona, extrusion plant, I was assigned in 1952 to my present position as Regional Extrusion Engineer with offices in Los Angeles.

During the years that I have worked for Reynolds Metals Company, I have become well acquainted with the customs and usages in its business and in the business of its competitors and customers with respect not only to the manufacture of extrusions, but also to the creative design of extru-

sions and redesign of proposed customers' extrusions.

Some time in April, 1954, my department received a print of an assembly picture and individual extrusions of a sliding glass door from Panaview Door & Window Co. This assembly picture was a full-scale cross-section picture of a proposed sliding door containing some details as to dimensions. My department took this print and by using a combination of dimensions given on the individual extrusion drawings, modification of design on some, and addition of "special assembly tolerances," made the necessary detailed section drawings. Certain of these sections, upon [36] submission to our extrusion mill for acceptability for manufacturing, required modification, and these modifications, at our suggestion, were incorporated in the individual section drawings. In addition, section assembly tolerances were computed by my department and added to the section drawings to insure that the sections would assemble properly and that the door would work. Section drawings made by my department were then, after approval by the customer, submitted to the mill for the making of die design drawings by mill engineering personnel.

At the time of submission to my department of the original cross-section print by Panaview Door & Window Co., there was no indication on the print or otherwise that the information submitted was either secret or confidential. In simple fact, the shapes ultimately designed by my department did

not differ in any substantial manner from other shapes for sliding doors or sliding windows in our files at that time, all sliding door and sliding window shapes being fundamentally similar. It is not at all unusual for a prospective customer to submit a cross-section picture or a sample of a competitor's door to my department with a request for a price quotation on the extrusions needed therefor. To my own personal knowledge, the submission of a print by Panaview Door & Window Co. to us was done in the normal and usual course of business, and there was nothing about the transaction which was in any way confidential, nor was it different from hundreds of other transactions which my department process each year. There was nothing in the Panaview Door & Window Co. design which was unique or unusual nor was I ever in any way instructed that the material which they furnished us should be treated as confidential or classified in any regard.

In the Los Angeles office, my department has made in the last two years more than 1,300 extrusion drawings for the manufacture of extrusions for individual customers, and within Reynolds [37] Metals Company there are more than 15,000 individual extrusion drawings. To my own knowledge and from my experience as an Extrusion Engineer, I know that hundreds of these drawings are similar in shape and design, and in a number of cases, are identical. In the case of the extrusion drawings which we made for Panaview Door & Window Co., there are in our Los Angeles office many extrusion

drawings which we have made for other customers which are similar in design and shape.

If Reynolds Metals Company were prevented from or enjoined from using any dies which would create or which are capable of producing articles which are the same as or similar in size, shape or design to the articles produced from the dies which were made by Reynolds Metals Company for the production of extruded shapes ordered by Panaview Door & Window Co., Reynolds Metals Company would suffer irreparable injury in that it would be enjoined from carrying on business with many other companies and industries for whom at the present time extruded articles similar in size, shape, and design to the Panaview door are manufactured the actual loss from which is unascertainable at this time. Furthermore, in view of the present lack of availability of aluminum, many other companies and industries dependent upon the Reynolds Metals Company for extrusions would be substantially and irreparably injured.

/s/ O. J. MEYER, JR.

Subscribed and sworn to before me this 14th day of September, 1955.

[Seal] /s/ GRACE M. CRARY,
Notary Public in and for Said County and State of
California.

My Commission Expires Jan. 26, 1957.

[Endorsed]: Filed September 15, 1955.

Received in evidence November 22, 1955. [38]

PLAINTIFF'S EXHIBIT No. 1

[Title of District Court and Cause.]

STIPULATION OF FACTS

The parties hereto hereby stipulate to the following facts:

1. During the period from April, 1954, through December, 1954, plaintiff ordered from defendant aluminum extrusions as follows:

(a) Customer Order No. P583 dated April 20, 1954, in the approximate sum of \$16,000.00, which Order was accepted and final credit approval given by defendant on May 11, 1954, and final shipment of which Order was made on or about October 5, 1954.

(b) Customer Order No. P1085 dated July 12, 1954, in the approximate sum of \$20,000.00, which Order was accepted and final credit approval given by defendant on [40] July 15, 1954, and final shipment of which Order was made on or about October 30, 1954.

(c) Customer Order No. P1750 dated September 30, 1954, in the approximate sum of \$20,000.00, which Order was accepted and final credit approval given by defendant on October 6, 1954, and final shipment of which Order was made on or about January 22, 1955.

(d) Customer Order No. P2502 dated December 13, 1954, in the approximate sum of \$16,670.00,

which Order was accepted and credit approval given on February 3, 1955, which was followed by a hold order from defendant's credit department dated February 17, 1955, and the Order was finally approved and released on February 23, 1955, and final shipment of which Order was made on or about May 31, 1955.

(e) Customer Order No. 3428 dated March 30, 1955, which Order was never accepted or acknowledged by defendant, but the parties reserve the right to produce testimony as to the reason for non-acceptance and non-acknowledgment.

2. Each of the Orders hereinabove in Paragraph 1 set forth, except Order No. 3428, were acknowledged in writing by defendant to plaintiff, which said written acknowledgment contained the Paragraph 11 which is set forth in plaintiff's Complaint.

3. Defendant manufactured nine sets of die tools under "T" Orders numbered 3318 through 3325, inclusive, to produce the extruded shapes ordered by plaintiff which were given Nos. 10414 through 10421, inclusive, and No. 10426. A charge was made by [41] defendant to plaintiff of \$1,430.00, denominated on the invoices as "Die Charge Prices," but the parties reserve the right to produce testimony as to the nature of such charge.

4. It is stipulated that defendant used the existing die tools made under "T" Orders numbered 3318 through 3325, inclusive (which had been previously used by defendant in producing extruded

shapes numbered 10414 through 10421, inclusive, for plaintiff) to produce the extrusions called for by the orders thereafter received by defendant from Windsor Supply, Inc., but the parties reserve the right to produce testimony as to the extent of the use of such dies.

Dated: November 17, 1955.

THOMAS P. MAHONEY, and
MACBETH & FORD,

By /s/ PATRICK H. FORD,
Attorneys for Plaintiff.

ADAMS, DUQUE &
HAZELTINE,

By /s/ HENRY DUQUE,
/s/ LAWRENCE T. LYDICK,
Attorneys for Defendant.

[Endorsed]: Filed November 18, 1955.

Received in evidence November 18, 1955.

[Title of District Court and Cause.]

PLAINTIFF'S OBJECTIONS TO DEFENDANT'S PROPOSED FINDINGS OF FACT

Plaintiff herewith objects to the proposed findings and conclusions, on the following grounds:

1. The proposed finding (Paragraph II, page 2) that the dies in question were not made solely for

plaintiff's use is contrary to the judicial admissions of defendant, both before and during the trial, in that the defendant's General Sales Manager, by affidavit and sworn testimony, admitted that Paragraph 11 of the Terms and Conditions did govern the title and use of the dies in this case. (See Ex. E, Aff. of Yates, September 15, 1955, page 3, line 26 to page 4, line 19.)

2. The said proposed finding that the dies were not made solely for plaintiff's use, is erroneous as a matter of law, in that the terminology "Die Charge" on the front side of the Acknowledgment form (Ex. 21) is directly interwoven with the "Terms and Conditions" on the reverse side, to wit, paragraph 11, which is the only provision by which plaintiff agreed to pay any [43] die charges, that is, to pay a die charge for the use of dies made "solely and specifically" for plaintiff's order.

3. The said proposed finding is not only contrary to the preponderance of the evidence, but is in conflict with all the evidence produced by both sides, in that there is no evidence that defendant made these dies for any one's use except for the plaintiff's orders on the acknowledgment of which the dies were listed and upon which a "die charge price" was collected (Ex. 21).

4. The said proposed finding would imply that plaintiff paid a "die charge" for some purpose other than that prescribed by paragraph 11. This would make paragraph 11 an utterly meaningless

clause in the contract. The die charge "price" would therefore be a purchase price under the ordinary meaning of contracts—there being no evidence of any agreement or custom to the contrary. Hence, plaintiff would be the outright owner of the dies, and defendant a mere bailee, within the strict purview of *Hollywood Eq. Co. v. Furer*, 16 Cal. 2d 184. The liberal Federal Rules of Pleading should persuade this Court to take hold of this problem rather than leaving it for independent litigation.

5. The said proposed finding violates the rule that any ambiguity should be construed against the drafter of the agreement. If there is, therefor, any possible difference in meaning between "die charge" on the front of the acknowledgment and in paragraph 11 on the reverse, that ambiguity must be resolved in favor of plaintiff, which was obviously led to believe that paragraph 11 was applicable. Even defendant's General Sales Manager thought and testified that it was applicable and that these dies were made "solely and specifically for use on buyer's order" (Ex. E, Yates Affidavit).

6. The said proposed finding ignores the fact that the "surrounding circumstances" introduced in evidence showed that defendant had frequently, both orally and in writing, led plaintiff [44] to believe that dies were restricted to the "sole use" of the buyer. The earlier form of contract (Ex. 5) though more specifically prohibitory, would, in ordinarily English, have the same meaning as Paragraph 11. No one reading the different phraseology

would ever dream that the rewording was designed to change the meaning—unless he assumed that the draftsman had an intent to deceive buyer into thinking their die charge payments gave them the same protection they used to get under the old form, but that the draftsman hoped a Court would feel that the word “solely” had been twisted into meaninglessness by combining the two first sentences of the old form (Ex. 5) into one sentence in the new paragraph 11. Compare also the other form used by defendant in Exhibit 15.

7. The purported finding in paragraph II, page 2, line 20 or 21 that “plaintiff paid to defendant a service fee for the use of said dies” can find utterly no support in the evidence—unless paragraph 11 applies to these dies, since it is the only place where plaintiff agreed to pay a die charge for use of dies. If paragraph 11 applies, then the dies are “solely” for plaintiff’s use. If it does not apply, then the die charge was a “price,” as mentioned on the face of the acknowledgment, and the transaction was *prima facie* a sale. There being no other evidence, title would pass and plaintiff would be the owner and defendant would be the bailee who clearly violated the rule of the Furer case, 16 C. 2d 184.

8. Plaintiff also objects to the phraseology “service fee” as that term was not used in the contract or in the evidence.

9. The finding No. V against the confidential relation is in conflict with the California law of

contractual protection of ideas, and defendant's plagiarism of plaintiff's design in making a second set of dies and in using the first set for its own profit, is, without contradiction in the proofs, a clear breach of the contract of the parties as understood in California [45] law.

10. The findings against unfair competition are in conflict with C.C. 3369, subdivision 3; although no case has yet applied the statute to an identical situation, the trend of decision indicates that this case is an appropriate one to call forth the application of C.C. 3369 and 3294.

Dated: December 13, 1955.

MACBETH & FORD,

THOMAS P. MAHONEY,

By /s/ PATRICK H. FORD,
Attorneys for Plaintiff.

POINTS AND AUTHORITIES

1. Re: Sole Use of Dies—Judicial Admissions.

The Yates Affidavit (Ex. E, pp. 3-4) takes the position that Paragraph 11 of the Terms and Conditions did apply to these dies but that its meaning was that "Panaview simply acquired a priority on the use of the dies whenever its orders for extruded shapes were received by "Reynolds" (Ex. E, p. 3, lines 30-32). Inasmuch as, by stipulation, plaintiff had orders with defendant at all times up

to June 3, 1955, the defendant's use of the dies for Windsor orders was a clear breach even on Yates' construction of the agreement. Hence, plaintiff would be entitled to damages even though no injunction would lie.

The Yates affidavit, it is submitted, is a judicial admission. It was used by defendant to oppose a preliminary injunction. It was used by defendant as testimony at the trial. The affiant was defendant's principal witness insofar as his title and office was concerned; he was the "General Sales Manager, Pacific Coast Region." (See Ex. E, p. 1, line 24.)

As Wigmore says in his treatise on Evidence, section 2590. [46]

"The vital feature of a judicial admission is universally conceded to be its conclusiveness upon the party making it * * *."

A supporting Federal case cited by Wigmore from the unfair competition field, and involving an admission that the products were competitive and that public confusion resulted, is Larson Jr. Co. v. Wrigley Jr. Co. (CCA 7th 1819) 253 F. 914, wherein the Court said:

"In a real and legitimate controversy, a party should be left within the knot of his averments in pleadings and admissions in testimony, unless the Court can find an absolute demonstration from other evidence * * * that under no

circumstances could the averments and admissions be true."

A judicial admission has been held to be conclusive on the party by whom it was made, or to whom it was attributable. *Wiget v. Becker* (1936) 84 F. 2d 706, 711 [citing *Wigmore Sec. 2590*].

"* * * [I]t is fundamental that judicial admissions are proof possessing the highest probative value. Indeed, facts judicially admitted are facts established not only beyond the need of evidence to prove them, but beyond the power of evidence to controvert them." *Hill v. Federal Trade Commission* (1941) 124 F. 2d 104, 106.

In affidavits, and direct examination of its witnesses, defendant has asserted, rather than admitted, the applicability of paragraph 11 of its "Terms and Conditions" to the use of those dies. Starting from the same basic premise they only differ in their conclusion. Whereas plaintiff interprets paragraph 11 as granting it an exclusive right, defendant interprets this same paragraph 11 as one establishing only a right of priority. But the point of importance is that both interpretations begin with [47] the wording and intent of paragraph 11.

The fact then that paragraph 11 of defendant's "Terms and Conditions" is applicable to the use of these dies was uncontested.

This evidence then may not be disregarded by the trier of facts. *Rash v. Peoples Deposit Bank & Trust Co.* (1951) 192 F. 2d 470, 471.

“It is true enough that the rule, though not universal is well established in the Federal courts, and in some state courts, that the uncontradicted testimony of a witness not impeached or discredited in any way, to a plain and simple fact capable of contradiction if untrue, does not raise an issue of fact to be submitted to a jury.” *Mutual Life Ins. Co. of N.Y. v. Sargent* (1931) 51 F. 2d 4, 6.

“When controlling, positive, and uncontradicted evidence is introduced, and when it is unimpeached by cross-examination or otherwise, is not inherently improper, and no circumstances reflected in the record casts doubt on its veracity, then it may not be disregarded, even though adduced from interested witnesses, and no question of credibility or issue of fact is presented for determination by the jury.” *Nicholas v. Davis* (1953) 204 F. 2d 300, 202.

A wilful disregard of the testimony of unimpeached witnesses so far as they testify to facts, will be grounds for a new trial. *U.S. v. 2,049.85 Acres of Land* (1943) 49 F.S. 20, 23.

The Affidavit of Defendant’s Agent Yates Is Admissible Against and Binding on His Principle

An affidavit sufficiently authenticated is competent evidence as an admission that the facts stated in

the affidavit are true. *National Steamship Co. v. Tugman* (1892) 143 U.S. 28, 31.

Relevant statements or admissions of an agent of a corporation, which are not privileged and confidential, and are within the scope of the agent's authority, are always admissible against [48] the corporation. *Takahashi v. Hecht Co.* (1931) 50 F. 2d 326. "In such cases they become statements of fact, and as such are binding on the corporation. This is more particularly true when they explain the acts of the corporation out of which the injury complained of arose." *Takahashi*, *supra*, p. 328.

As defendant's Regional General Sales Manager Yates was in a position of authority and responsibility, the statements and admissions in his affidavit were within the scope of his authority.

"Under California law where it is shown that a person was given actual, ostensible authority to act for another in a particular matter, any declarations made by the agent at the time of the transaction of the business entrusted or apparently entrusted to him and relating to such business is admissible as part of the *res gestae*." *State Farm Mut. Auto Ins. Co. v. Porter* (1950) 186 F. 2d 834, 845.

"Admissions made by an agent of a party will be received in evidence when the agent's powers are broad enough to constitute him the general representative of the principal with broad managerial powers." *Moran v. Pittsburgh-Des Moines Steel Co.* (1950) 183 F. 2d 467, 472.

Even if the principal does not expressly vouch for his agent's statement, it is admissible against him as an adoptive admission if he acts or conducts his business in such a way as to show by implication that he adopted the statement. *Pekelis v. Transcontinental & Western Air* (1950) 187 F. 2d 122, 128.

2. Sole Use of Dies—Contract Must Be Construed To Call For.

This point is that the term "die charge" on the front of the Acknowledgment (Ex. 21) must, as a matter of law, refer to the same thing as the term "die charge" in paragraph 11 on the reverse. There could be no ambiguity. (See point 5 for effect of any possible ambiguity.) The contract, read as an entirety, must tie in the use of this term in two places as having the same [49] meaning in each place. Paragraph 11 provides for a die charge for use of dies made "solely and specifically" for buyer's order. No die charges or other special charges were made for use of any other dies or equipment in defendant's plant—even though defendant has judicially admitted that the dies were "a relatively insignificant part of the total equipment used in the manufacture of aluminum extrusions." (Aff. of Beck, dated September 13, 1955, p. 2, lines 27-29.)

A very recent case is *Estate of Shuster* (1955) 137 A.C.A. 137, in which Fox, J., held that "a word or phrase occurring more than once in a will is presumed to be used in the same sense." This rule of

construction applies to contracts as well as to other documents, like wills. 3 Williston on Contracts, 1780, citing the old maxim *Noscitur a sociis*. See also: Rock I. Ry. v. Rio G. RR. (1891) 143 U.S. 596, 609; Miller v. Mattice (1931) 35 Ariz. 180, 188.

The California Supreme Court, in a contract case involving a lease, unanimously held:

“It is a familiar rule of construction that, other things being equal, words used in a certain sense in one part of an instrument are deemed to have been used in the same sense in another.” (Pringle v. Wilson, 1909) 156 Cal. 313, 319.

3. Sole Use of Dies—Uncontradicted Evidence Is That Dies Were Made Solely for Plaintiff’s Order.

Although counsel for defendant ignored his own prior judicial admissions and argued that plaintiff needed some separate evidence that these dies were made solely for plaintiff’s order, there was utterly no evidence offered by defendant that it made the dies for any other purpose than to fulfil the specific order placed by plaintiff. Defendant, at that time, certainly had no other use for the dies. According to Yates (Ex. E), paragraph 11 [50] applied and defendant would claim the right of ownership and use of the dies whenever plaintiff had no order in defendant’s plant. But until the order was received from Windsor in November, 1954, defendant had no specific use in mind for these dies. That the dies

were made specifically for this order was conceded, and the Acknowledgment Form (Ex. 21) would suffice to prove that fact. The tie-in of the die charges on that Acknowledgment with paragraph 11 on the reverse thereof—which is the only reference to what die charges mean—shows that the die charges were for use of dies made “solely and specifically” for plaintiff’s order. No other construction would be reasonable. No other evidence was proffered.

Defendant’s specious defense of “custom” was abandoned at the trial, with the lame excuse that it was abandoned as a defense to Count One because plaintiff had abandoned any attempt to prove a different custom under Count Two—relying instead on the evidence of the past practice between Reynolds and other corporations and the general law of confidential relations and plagiarism. This abandonment of the custom defense, and the shifting to a new defense at the opening of the trial—a defense in direct conflict with the sworn statement of defendant’s own General Sales Manager (Ex. E, Yates)—should be weighed most seriously by this Court in determination of the good faith of the defense!

4. Die Charge Price—Implied Sale Unless Paragraph 11 Applicable.

If a written contract lists certain dies and a “die charge price,” certainly the common ordinary meaning of the terminology would be that a sale has

occurred. The dies would then belong to the buyer, and use by the seller as bailee would be strictly within the factual limits of *Holly Eq. Co. v. Furer*, 16 C. 2d 184.

Defendant's only alternative to avoid that strict application, it would seem, is to concede that paragraph 11 on the reverse of the contract defines "die charge" to mean a sort of [51] "rental" charge applicable whenever dies are made "solely and specifically" for plaintiff's order.

The ambiguity on which defendant must rely to escape from paragraph 11 is to argue that "die charge" as used on the front of the contract had a different meaning than when the same phrase was used in paragraph 11. Because, if the meaning was the same the die charges were paid for use of dies made "solely" for buyer's use.

Assuming that there is an ambiguity, then the law requires that the ambiguity be construed in favor of plaintiff.

Hay v. Allen

(1932) 112 C.A. 2d 676.

Myers v. Alta Con. Co.

(1951) 37 C. 2d 739, 743.

If it is possible to escape from the rule by parol evidence, the burden was on defendant, not on plaintiff. Hence, the Court erred in holding that plaintiff had not met the "preponderance."

Laidlaw v. Marye

(1901) 133 C. 170.

Kirkpatrick v. Pye
(1922) 59 C.A. 125.

Balfour v. Fresno Co.
(1895) 109 C. 221.

Keller v. Hiers
(1951) 108 C.A. 2d 424.

6. Defendant's Own Attorney Interpreted the Contract in the Same Way Plaintiff Understood It.

Counsel for plaintiff find it impossible to believe that their client's understanding of the contract was not sound, inasmuch as a letter from defendant's own house counsel is substantially in agreement with our position.

A copy of the letter is attached hereto as an exhibit. Counsel for defendant was shown this letter during the recess just prior to the announcement in open court that he withdraw his defense of "custom and usage."

Respectfully submitted

THOMAS P. MAHONEY,
MACBETH & FORD,
By /s/ PATRICK H. FORD,
Attorneys for Plaintiff. [52]

EXHIBIT

Reynolds Metals Company
General Offices, Richmond, Virginia

Address reply to
General Sales Office
2500 South Third Street
Louisville 1, Kentucky

April 28, 1955.

Frank T. Cotter, Esquire,
Wilson, Selig & Cotter,
650 South Grand Avenue,
Los Angeles 17, California.

Dear Mr. Cotter:

Although you find paragraph 11 in our terms and conditions ambiguous, I am pleased to know that you consider our form above par. I shall try to clarify the "ambiguities" under paragraph 11.

- (a) You cannot remove a die and put it in another shop.
- (b) When a service charge is made for the die, we cannot use it for other customers.
- (c) We pay personal property taxes.
- (d) We pay for maintenance, repair and replacement.

With regard to using the die for another customer, we assume no obligation not to make an identical die for another customer; that is, we assume

no obligation in connection with the design of the die.

I assume that you know that the charge paid by a customer for a die does not represent the die's purchase price. In some instances the charge is only a fraction of the purchase price of the die; in others, the charge is in excess of the purchase price. In the latter situation, the charge is based on the anticipated short life of the die, on the cost of adapting other equipment for use with the die, or perhaps both.

I hope the foregoing explains our equipment provision to your satisfaction. Since one of our terms of sale is involved in your problem, I am naturally curious to know the nature of the problem. If you find it necessary to write further, perhaps you could tell me why our provision is relevant to your client's matter.

Very truly yours,

/s/ JOHN H. GALEA,
Attorney.

JHG:jh

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 15, 1955. [53]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on for trial on November 18, 1955, in the Courtroom of the Honorable William C. Mathes, Judge Presiding, the Court sitting without a jury, a jury having been waived by the parties hereto. Plaintiff appeared through its attorneys of record, Thomas P. Mahoney, Esquire, and Messrs. Macbeth & Ford, by Patrick H. Ford, Esquire, and defendant appeared through its attorneys of record, Messrs. Adams, Duque & Hazeltine by Henry Duque, Esquire, and Lawrence T. Lydick, Esquire. Evidence, both oral and documentary, was taken on behalf of the parties, and the matter having been submitted to the Court for consideration, and the Court having duly considered the same, now makes its Findings of Fact and Conclusions of Law as follows:

Findings of Fact

I.

It is true that plaintiff is a corporation duly organized [55] and existing under the laws of the State of California with its principal place of business in Los Angeles County and that defendant is a corporation duly organized and existing under the laws of Delaware and having a regular and established place of business in this judicial district. It is also true that the jurisdiction of this Court is founded upon diversity of citizenship between the

parties and upon the fact that the matter in controversy, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars (\$3,000.00).

II.

It is true that some time during the months of April, May, or June, 1954, plaintiff placed with defendant and defendant received from plaintiff orders for the manufacture by defendant of extrusion dies to be used in producing extruded shapes for a sliding door and that defendant acknowledged said orders in writing, which said acknowledgments contained certain Terms and Conditions, including therein a Paragraph 11 which is set forth in Paragraph III of plaintiff's Complaint. It is also true that after said extrusion dies were manufactured by defendant, plaintiff paid to defendant a service fee for the use of said dies in the manufacture of extruded shapes therefrom. It is not true, and plaintiff has failed to establish by a preponderance of the evidence, that the dies in controversy were constructed "solely for use on buyer's order" within the meaning of Paragraph 11 of the Terms and Conditions set forth in Paragraph III of plaintiff's Complaint, nor is it true that defendant at any time agreed to keep such dies for plaintiff's sole and exclusive use.

III.

It is not true, as is alleged in Paragraph IV of plaintiff's Complaint, that defendant violated its contract by using the aforesaid extrusion dies to make extrusions for plaintiff's competitors, and in

this connection, the Court finds that [56] while said dies were at one time used by defendant to produce extrusions for Windsor Supply, Inc., such use was not in violation of any contract or contracts existing between plaintiff and defendant.

IV.

It is true that the dies which were manufactured by defendant for plaintiff were to be used in producing extruded shapes for the construction of an aluminum sliding door which plaintiff sold under the name of "Panador," but the Court finds that plaintiff has failed to establish by a preponderance of the evidence any of the other allegations set forth in Paragraph V of plaintiff's Complaint on file herein and that each of the said allegations is untrue. The Court further finds that plaintiff has not been damaged in the sum of Two Hundred Fifty Thousand Dollars (\$250,000.00) or in any other sum whatsoever.

V.

It is true that some time prior to June 30, 1954, plaintiff conceived and developed a sliding door to which it applied the name of "Panador," which said door included an aluminum frame and an aluminum sash of various shapes, and that the drawings of such extruded shapes were reduced to blueprint form by plaintiff and submitted to defendant in that form. Except as hereinabove in this paragraph found to be true, the Court finds that plaintiff has failed to establish by a preponderance

of the evidence any of the other allegations contained in Paragraphs VII, VIII, IX, and X of plaintiff's Complaint, and that each of the said allegations is untrue. In this connection, the Court further finds that at no time did there ever exist between plaintiff and defendant a fiduciary or trust relationship of any kind or character, nor was there any evidence received in the trial of the action to establish the universal custom of the aluminum extrusion industry with regard to the matters in the allegations contained in the [57] Second Cause of Action of plaintiff's Complaint.

VI.

The Court finds that each and all of the allegations of Paragraphs XII, XIII, XIV, and XV of plaintiff's Complaint are untrue and that plaintiff has failed to establish by a preponderance of the evidence either or any of such allegations.

Conclusions of Law

From the foregoing Findings of Fact, the Court concludes as follows:

I.

Plaintiff has failed to establish by a preponderance of the evidence that the dies in controversy were constructed "solely for use on buyer's order" within the meaning of the contract alleged in the First Cause of Action of plaintiff's Complaint, and there has been no breach of said contract by defendant, and plaintiff is not entitled to recover any

damages from defendant by reason of any alleged breach of said contract.

II.

There never existed at any time a fiduciary or trust relationship between plaintiff and defendant in connection with the matters referred to in plaintiff's Complaint, nor was there ever any disclosure by defendant of any confidential information furnished to it by plaintiff.

III.

Defendant did not by any act or transaction unfairly compete with plaintiff at any time, nor has defendant ever done any act which would entitle plaintiff to punitive or exemplary damages under California Civil Code Section 3294.

IV.

Plaintiff has not been irreparably or otherwise injured by any of the acts of defendant nor is or has plaintiff at any time ever been entitled to injunctive relief against defendant by [58] reason of any of the allegations contained in plaintiff's Complaint.

V.

Defendant is entitled to judgment, that plaintiff take nothing by reason of its Complaint on file herein; and that defendant have and recover from plaintiff its costs of suit incurred herein.

Let Judgment be entered accordingly.

Dated: December 19, 1955.

/s/ WM. C. MATHES,
Judge.

The within Findings of Fact and Conclusions of Law are hereby approved.

Dated: December . . ., 1955.

THOMAS P. MAHONEY and
MACBETH & FORD,

By
Attorneys for Plaintiff.

The within Findings of Fact and Conclusions of Law are hereby disapproved as to form.

Dated: December 9, 1955.

THOMAS P. MAHONEY and
MACBETH & FORD,

By /s/ P. H. FORD,
Attorneys for Plaintiff.

Receipt of copy acknowledged.

Lodged December 9, 1955.

[Endorsed]: Filed December 19, 1955. [59]

In the United States District Court, Southern
District of California, Central Division
No. 18469-WM

PANAVIEW DOOR & WINDOW CO., a Corpora-
tion,

Plaintiff,
vs.

REYNOLDS METALS COMPANY, a Corpora-
tion,

Defendant.

**JUDGMENT FOR DEFENDANT AND ORDER
DENYING INJUNCTIVE RELIEF**

This matter came on for trial on November 18, 1955, in the Courtroom of Honorable William C. Mathes, Judge Presiding, the Court sitting without a jury, a jury having been waived by the parties hereto. Plaintiff appeared by its attorneys of record, Thomas P. Mahoney, Esquire, and Macbeth & Ford, by Patrick H. Ford, Esquire, and defendant appeared by its attorneys of record, Adams, Duque & Hazeltine by Henry Duque, Esquire, and Lawrence T. Lydick, Esquire. Evidence, both oral and documentary, was taken on behalf of the parties hereto, and the matter having been submitted to the Court for its consideration and the Court having duly considered the same and having made and filed its Findings of Fact and Conclusions of Law herein, now, therefore,

It Is Hereby Ordered, Adjudged and Decreed that plaintiff take nothing of or from defendant by reason of its Complaint on file herein or by reason of any of the allegations [60] therein contained.

It is further ordered, adjudged, and decreed that plaintiff's Motion for a Preliminary Injunction or for any other injunctive relief be and it is hereby denied.

It is further ordered, adjudged, and decreed that defendant recover its costs of suit incurred herein, taxed at \$209.40.

Dated: December 19, 1955.

/s/ WM. C. MATHES,
Judge.

The within Judgment for Defendant and Order Denying Injunctive Relief is hereby approved.

Dated: December . . . , 1955.

THOMAS P. MAHONEY and
MACBETH & FORD,

By
Attorneys for Plaintiff.

The within Judgment for Defendant and Order Denying Injunctive Relief is hereby disapproved as to form.

Dated: December 9, 1955.

THOMAS P. MAHONEY and
MACBETH & FORD,

By /s/ P. H. FORD,
Attorneys for Plaintiff.

Receipt of copy acknowledged.

Lodged December 9, 1955.

[Endorsed]: Filed December 19, 1955.

Docketed and entered December 20, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL BY PLAINTIFF

To the Court:

Please take notice that the plaintiff hereby appeals from the judgment in the above case, to the United States Court of Appeals, Ninth Circuit.

Dated: January 12, 1956.

THOMAS P. MAHONEY and
MACBETH & FORD,

By /s/ PATRICK H. FORD,
Attorneys for Defendant and
Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed January 12, 1956. [62]

In the United States District Court, Southern
District of California, Central Division

No. 18469-WM.

PANAVIEW DOOR & WINDOW CO., a Corpora-
tion,

Plaintiff,

vs.

REYNOLDS METALS COMPANY, a Corpora-
tion,

Defendant.

Honorable William C. Mathes, Judge, Presiding.

REPORTER'S TRANSCRIPT
OF PROCEEDINGS

Los Angeles, California

Friday, November 18, 1955

Appearances:

For the Plaintiff:

MACBETH & FORD, by
THOMAS P. MAHONEY, ESQ., and
PATRICK FORD, ESQ.

For the Defendant:

ADAMS, DUQUE & HAZELTINE, by
HENRY DUQUE, ESQ., and
LAWRENCE LYDICK, ESQ.

November 18, 1955—1:45 P.M.

The Court: Are there any ex parte matters?

The Clerk: No, your Honor.

The Court: Call the calendar.

The Clerk: Case No. 18469, Panaview Door & Window Co. vs. Reynolds Metals Company.

Mr. Mahoney: Ready for the plaintiff.

Mr. Duque: Ready for the defendant.

The Court: You may proceed on behalf of the plaintiff.

Mr. Duque: Your Honor, may I interrupt counsel before he proceeds? May I introduce to the court Mr. Fred R. Edney of the Law Department of the Reynolds Metals Company from Louisville,

Kentucky, who will be sitting at counsel table but who will not participate in the trial.

The Court: Very well. Mr. Edney is welcome.

OPENING STATEMENT ON BEHALF OF PLAINTIFF

Mr. Mahoney: May it please the court, the position of the plaintiff can be divided into three primary headings. One is that there was indubitably an admitted contract between the plaintiff and the defendant. Two, that there were submissions in confidence by the plaintiff to the defendant of drawings and of the work products of the mind and the minds of the plaintiff's employees. And, three, that the defendant by certain of its acts facilitated the breaking [3*] of the relationships of a customer of plaintiff's, and also facilitated the open competition of that customer with plaintiff.

But, furthermore, under the third heading the plaintiff intends to prove that the defendant actually manufactured substantially what the plaintiff was accustomed to manufacture and sold what it had manufactured under the guise of doors to the former customer of the plaintiff in direct sales competition with the plaintiff; and that it did this for its own profit in competition with the plaintiff.

The Court: That the defendant did it directly?

Mr. Mahoney: That is correct, your Honor. We intend to prove that when these extrusions were

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

taken on the order of defendant from the extrusion department to the parts department, the defendant then placed these extrusions in a condition in which they were substantially equivalent to the condition in which the plaintiff would place them; and that these extrusions, and what had been done with them and the parts supplied by the parts department, were never sold under poundage but were sold as so many doors by Reynolds Metals to the former customer, Windsor Supply Company, by the defendant.

The Court: Sold wholesale, I take it?

Mr. Mahoney: Sold wholesale, that is correct, in the same manner that the plaintiff sold them [4] wholesale.

Now, getting down specifically to the issues here there is no question but that the contract is admitted. There is no question but that the dies were used, the specific dies manufactured from the plaintiff's drawings by the defendant under the contract were used by the defendant to manufacture extrusions not for anybody else who was a third party, but for its own account. The order for the extrusions came from the parts department to the extrusion department, and Reynolds Metals was in a sense buying the extrusions from plaintiff's dies so that it could get into competition with the plaintiff.

Now, fundamentally, while the defendant here has at last admitted that a contract exists, the plaintiff has been somewhat at a loss to determine on what basis the defendant's position in regard to the interpretation of the contract may be.

The Court: Before you leave that—are you coming back to this last contention you mentioned?

Mr. Mahoney: Oh, yes, your Honor, I will get back to that subject in much greater detail.

The Court: Isn't the substance of your contention that the defendant was akin to a contributory infringer to the patent—

Mr. Mahoney: Yet, this is a very interesting case of first impression, your Honor.

The Court: —that the defendant contributed to the [5] unfair competition of one of your competitors, and contributed by making it possible for your competitor to palm off as his own goods that were essentially those of the plaintiff?

Mr. Mahoney: Well, your Honor, we don't take exactly that position because we feel that the acts of the third party here, other than the fact that the defendant practically set them up in business in competition with us, with the plaintiff, we don't feel that the issue of palming off enters into this case at all.

The Court: Let's analyze that just a moment so I will understand it. I suppose there is nothing illegal. If the defendant wanted to set some competitor up in business, a competitor against some of its customers, I suppose that might be considered unethical or commercially immoral, but not illegal, would it be?

For instance, there is nothing to prevent Reynolds Metals Company, or any other manufacturer, I take it, if they consider it good business to do so, to finance a dozen competitors of their customers.

Mr. Mahoney: Well, as a matter of fact, they do that themselves. They actually, in their own parts department—

The Court: Let's just stay away from that. So that I will be sure to understand it, you don't contend there is anything illegal about that, do [6] you?

Mr. Mahoney: No, your Honor.

The Court: So any unfair competition would have to consist, would it not, in enabling one of your competitors to compete unfairly with the plaintiff.

Mr. Mahoney: Well, it goes further than that, your Honor. To make myself clear on the issue—

The Court: Well, there may be more to it than that, but let's talk about the minimum. The very minimum would be that, wouldn't it?

Mr. Mahoney: Yes, your Honor.

The Court: Now, how is it contended by plaintiff that the defendant, Reynolds Metals Company, here made it possible for one of your competitors to compete unfairly with you, or to engage in an unfair trade practice?

Mr. Mahoney: We don't say exactly that, your Honor. What we say is that the Reynolds Metals Company is engaged in an unfair trade practice themselves.

The Court: Well, in order to say that you must say, must you not—I don't recall the name of this company.

Mr. Mahoney: Panaview Door & Window Co.?

The Court: No, not that one.

Mr. Mahoney: Windsor Supply.

The Court: Windsor.

Mr. Mahoney: Yes.

The Court: You must say, must you not, that Windsor [7] was an agent of Reynolds.

Mr. Mahoney: No, your Honor. If we take—this is a diversity case, and we take the California law which is pertinent thereto. Unfair competition is defined and paraphrased as unfair or fraudulent action, business action on the part of a defendant. And we intend to prove that by that definition the defendant here did engage in unfair and fraudulent tactics to the detriment and harm of the Panaview Door & Window Co.

The Court: Well, if it did, then Windsor did also, necessarily, did it not?

Mr. Mahoney: That is not necessarily so, your Honor. Because what Reynolds did, we contend, was the primary and the essential harm, and that Windsor was just placed in a position to compete directly with Panaview Door & Window Co., the plaintiff here, its former supplier.

The Court: By offering the same product, essentially the same product—

Mr. Mahoney: The identical product to actual customers who had been established, and facilitating what the defendant did here.

The Court: Very well. Then the tort alleged to have been committed by Reynolds is the tort of using plaintiff's dies to make—

Mr. Mahoney: Its own product. [8]

The Court: —to make doors similar to those

of the plaintiff, substantially identical to those of the plaintiff.

Mr. Mahoney: Identical, substantially.

The Court: Well, you may go that far if you like, but it is sufficient—

Mr. Mahoney: There are a few minor details in the findings, such as rollers and things of that nature.

The Court: And distributing it to the trade, so to speak.

Mr. Mahoney: And particularly to a former customer, and alienating that former customer by virtue of the fact that it had direct access to what really was the plaintiff's.

The Court: Well, that is proof of damage, isn't it, as distinguished from proof of the tort?

Mr. Mahoney: Well, we have many factual ramifications here, your Honor.

The Court: Let us get at it this way: Would not the plaintiff's contention be the same if Reynolds had sold these doors to a half dozen people in the trade?

Mr. Mahoney: Yes, your Honor.

The Court: Or, to be more specific still, to anyone in the trade?

Mr. Mahoney: Yes, your Honor. But the wrong is aggravated by—

The Court: But that goes to damages, does it not?

Mr. Mahoney: That is right. [9]

The Court: Let's talk about the tort itself.

Mr. Mahoney: Yes, your Honor.

The Court: So the tort must be in the wrongful use of the dies, is that it?

Mr. Mahoney: And the information which it got to construct the dies from.

The Court: Let's get at it this way: Suppose there were no dies. Suppose it is an assembled product of some kind, but it is like the plaintiff's. Would your contention be the same?

Mr. Mahoney: I don't think you can actually draw an analogy there, your Honor. If this were just a common ordinary product—well, let's take a common measuring cup, take an aluminum measuring cup, and the defendant here was extruding, if it were feasible and possible to do so, a plurality of measuring cups which were standard on the market, this would be nothing because there was no property right and there was no contract.

The Court: Suppose you took some kind of a product that you could take standard—

Mr. Mahoney: Standard components.

The Court: —components, stove bolts and nuts and screw them together in a way and they look just like the plaintiff's. There would be no wrong there, I take it, unless Reynolds contributed to the tort of palming off— [10]

Mr. Mahoney: That is correct, your Honor.

The Court: —those as plaintiff's goods.

Mr. Mahoney: That is correct.

The Court: And there is no claim of palming off here, as I understand it?

Mr. Mahoney: That is correct.

The Court: So then must we not get back to this:

That the essential tort claimed here is the maluse of the dies?

Mr. Mahoney: And the information which—

The Court: Yes.

Mr. Mahoney: —was submitted to Reynolds.

The Court: Well, of course, I have no knowledge of that. I was trying to reduce it to its simplest form.

In other words, the wrongful use of what is essentially claimed to be plaintiff's.

Mr. Mahoney: To be reserved for the exclusive use of the plaintiff.

The Court: Yes. So that gets us right back to the contract, doesn't it?

Mr. Mahoney: Well, it is very interesting to notice, your Honor, the drift in the law on the point of view of contracts to so interpret these contracts that there is implicit obligation of good faith.

The Court: But that still gets us back to the contract, doesn't it, and to the interpretation to be placed upon it? [11]

Mr. Mahoney: And the breach of confidential relationship arising out of the misuse of the confidential information submitted.

The Court: That is still a part of the contractual relationship, isn't it?

Mr. Mahoney: Yes, this is the contractual relationship.

The Court: Very well. I think I understand it.

Mr. Mahoney: Now, going back to the contract, your Honor, originally looking at the whole litigation and the pleadings from the point of view of

history, the contract was originally categorically denied in the statement of reasons in support of defendant's objections to plaintiff's motion for a preliminary injunction. Then the defendant changed its grounds and appeared to take the position that the word "solely," in the language of the contract wherein it was stated that the dies were solely for the use of the plaintiff, it appeared to take the position that this word "solely" was to be interpreted perhaps as a word heavy with custom and usage; in other words, that what it meant was that the defendant only had to reserve the use of the dies when it was necessary to complete the orders of the plaintiff. But if there were no orders of the plaintiff in the plant, then it could use the dies for the orders of others. [12]

The Court: Well, the plaintiff claims, as I understand it, that it was entitled to—

Mr. Mahoney: Exclusive use.

The Court: —all of the extrusions from those dies.

Mr. Mahoney: That is correct. That is our interpretation of the agreement.

The Court: Or, to put it another way, that the defendant was not entitled to make use of the dies for any other purpose at any time except other than the production of extrusions for the plaintiff on plaintiff's order.

Mr. Mahoney: That is our contention, your Honor.

Now, in the supplemental memorandum of law, which has just been submitted and filed here, the

defendant takes a rather perplexing position to the plaintiff.

The Court: Well, perhaps we are ahead of ourselves in taking this up, aren't we?

Mr. Mahoney: All right, your Honor.

The Court: Do you offer in evidence the stipulation of facts, or have you completed your statement?

Mr. Mahoney: These have been offered here.

The Court: Have you completed your opening statement?

Mr. Mahoney: No, your Honor.

Now, the California law on contracts is incontrovertibly to the fact that the words of the contract are to be understood in their ordinary and popular sense. And the plaintiff [13] intends to prove, and can prove, that the burden of proof in this regard rests entirely with the defendant to prove that there was a custom or trade usage which would justify them in imparting to the language of the contract any other meaning than that which is the customarily understood and the common meaning of the words used there.

The Court: I would assume that would be true in any case, would it not, that the parties to the agreement asserting the use of a word in some special sense has the burden of proving the agreement so to use the word?

Mr. Mahoney: Yes, your Honor, and we only accentuate that because we want to make it clear that we have difficulty in understanding the defendant's position in this regard.

Now, on the point of breach of confidence, we intend to prove that the plaintiff was assured by employees of the defendant that such information as was disclosed by the plaintiff to the defendant would be kept in confidence, and that in the course of their dealings as executives and employees of the plaintiff, and also as executives of associated corporations of the plaintiff, they had been informed by rather responsible representatives of the corporation that it was the custom of the corporation to utilize the dies exclusively for the customer that paid the die charge; and also to keep any information which was conveyed by the customer to the defendant in confidence. [14]

On the question of unfair competition, which we think is one of the more interesting aspects of this litigation, the defendant has always taken the position in its pleadings that it was not in any way competing with the plaintiff. However, what the defendant did—and this will be proven—is that it negotiated with the customer, Windsor, of the plaintiff, prior to the time at which Windsor severed its relationship with the plaintiff. And we will show, also, that even if the contract were to be interpreted as meaning that Reynolds was entitled to utilize the dies when there was no order in the plant of plaintiff in behalf of another customer, we can show that there was a continual chain of orders and that the plaintiff was being shorted on his deliveries which considerably handicapped them in their operations, while material was being supplied to Windsor—doors were actually being

supplied to Windsor by the defendant here by utilizing extrusions from the dies of the plaintiff.

The Court: There is no contention of any wrongful palming off.

Mr. Mahoney: No, your Honor. The thing that is most important to understand about this phase of the operation of Reynolds is that its parts department is substantially an independent operation from the extrusion department and acts, in a sense, as a manufacturing outlet for many completely fabricated parts. [15]

For instance, Reynolds manufacturers various types of windows for its own account; and manufactures other articles of that type, and sells these as a wholesaler to distributors, to jobbers and the like. And when the order went from the parts department to the extrusion department, Reynolds was ordering the extrusions from plaintiff's dies in exactly the same manner as it would have if it had ordered extrusions for its own product from its own dies, and was utilizing these extrusions to fabricate, as far as it possibly could, the essential components of a door which was sold to Windsor, which had previously been the customer of the plaintiff.

The Court: Is there any contention here that this door in its structural appearance, or any other aspect, has acquired some secondary meaning in the trade?

Mr. Mahoney: Well, your Honor, there is a contention here because, as a matter of fact, as will be testified to, the remarkable similarity of appearance here where the identical components parts

were supplied to the former customer of the plaintiff naturally enabled the plaintiff—rather, the former customer Windsor to assume the position that it had a continuous supply from the same source of the identical door. So it could walk into its former contact and say, "We are not giving you anything different. We are giving you the same thing, the same dies from exactly the same source." [16]

The Court: Isn't that a palming off?

Mr. Mahoney: Well, there is an element of palming off in that, yes, your Honor. And this greatly facilitated Windsor's success.

The Court: But is there a contention that the plaintiff had established for its doors some secondary significance in the trade?

Mr. Mahoney: It has not been so pleaded, your Honor, but we would be glad to amend the pleading to conform to the evidence here on that question because I think we can produce testimony that this remarkable identity of appearance naturally facilitated the approach of Windsor, with this product, which it was now buying from the defendant, to customers and laying the customer's fears aside that there would be a new product, an untried product which they would have start in on all over again.

The Court: Only so if this product, by reason of its appearance, or some other quality could be palmed off as being plaintiff's product.

Mr. Mahoney: It can't. It is identical in appearance, and therefore could be palmed off that, implied assurance to the customer, I take it, if he knew something of plaintiff's product.

Mr. Mahoney: Yes. And the customer, the principal customer here, of course, was very conversant. Fuller, which [17] was the principal customer with Windsor, had its connection, of course, was extremely conversant with the product which Windsor had been selling them because they had a tremendous order for purchase.

The Court: In trade parlance, I take it, the defendant was the manufacturer and Windsor was—what? A jobber or distributor?

Mr. Mahoney: The plaintiff, you mean, your Honor, was the manufacturer.

The Court: Reynolds on the defendant's side—

Mr. Mahoney: Oh, yes. Reynolds was taking the position of a manufacturer.

The Court: And Windsor was a jobber or distributor?

Mr. Mahoney: That's right.

The Court: And when you say "Fuller," are you referring to the Fuller Paint Company?

Mr. Mahoney: That is correct.

The Court: They would be the retailer.

Mr. Mahoney: That is correct. Now, the measure of the wrong which the defendant here has brought against the plaintiff is the fact that while the plaintiff was negotiating with Windsor a critical question of payment of a large sum of money for doors which had already been delivered by plaintiff, on the very affidavits of the defendant we know that Reynolds was dealing with the Windsor company, the [18] Windsor Supply Company, to manufacture this door for the Windsor Supply Company.

Therefore, it placed the Windsor Supply Company in a position in which it could immediately sever its relationship with the plaintiff and go into business over night with the identical product, substantially identical product, and compete with the plaintiff in the market.

Now, this is important because there was absolutely no necessity on the part of Windsor to make a copy, to do anything but accept delivery from Reynolds, from its parts department. Therefore, there was absolutely no significant hiatus or gap, so far as time was concerned, and Windsor was able to make its deliveries. If it had been compelled to copy the door from the ground up, if it had been compelled to have die drawings made, if it had been compelled to have dies manufactured, a long period of time would have elapsed. By this time Windsor would not have been a factor in the market at all. Windsor would have been a dead duck. And it was Reynolds' intervention in this picture which placed Windsor in the position to do the damage that it has done.

The Court: That in itself wouldn't be a tort, would it, an actionable wrong?

Mr. Mahoney: When it is performed by fraudulent acts upon the—

The Court: By fraudulent acts do you mean the claimed misappropriation of the use— [19]

Mr. Mahoney: Of the dies.

The Court: —of the plaintiff's dies?

Mr. Mahoney: And the confidential information. That is correct.

Does your Honor desire at this time a discussion of the criterion of damage under the applicable California law?

The Court: No, I don't think you need to go into that at this point.

Does the defendant wish to make an opening statement?

Mr. Duque: A very brief one, your Honor. And I also wish to call to the Court's attention a correction in the defendant's answer. At the time the answer was prepared, having been filed on September 2nd, and when the case first came into my office, I was under the impression when I prepared the answer that our client Reynolds Metals Company had prepared a second set of dies identical to the ones that they had prepared for Panaview, and that these dies were used in making the extrusions for Windsor. I subsequently found, by the time the affidavits were filed, that while the second set of dies had been prepared that some of the dies that had been made for Panaview extrusions were used to produce Windsor extrusions. And, consequently, I would like to amend my answer, and particularly paragraph I thereof which denies the allegations of plaintiff's paragraph IV, so as to admit, as we have shown affirmatively in our [20] affidavits, that the dies which were made by Reynolds Metals Company for the production of extrusions for the plaintiff were used by it, in part, to produce some of the extrusions for Windsor Supply Company.

The Court: Do you wish to file a formal amend-

ment, or do you wish to make some amendment by interlineation?

Mr. Duque: Well, your Honor, I suppose I could do it either way. By interlineation I could admit—I think that it has already been covered by the stipulation of facts, your Honor. So, in other words, in the stipulation of facts we admit that those dies were in part used to produce Windsor extrusions. So I think it is covered there. All I wanted to do was clarify the issue to the Court so there would be no misunderstanding that we do not deny that the dies were so used.

The Court: Very well.

Opening Statement on Behalf of the Defendant

Mr. Duque: In reply to counsel's opening statement, the position of the defendant in this case is as follows: We have never admitted that there was a contract existing between the plaintiff and the defendant for the exclusive use of the dies. We admitted at all times that acknowledgments were sent after each order was placed and the acknowledgment contained paragraph 11, which is set forth in plaintiff's complaint. We contend that paragraph 11, which states: [21]

"Any equipment (including jigs, printing plates or cylinders, dies and tools, etc.) which Seller constructs or acquires specifically and solely for use on Buyer's order shall be and remain Seller's property and in Seller's sole possession and control * * *,"—

Our contention is that that is not a contract for the exclusive use. All that says is that if there are any dies which are made specifically and solely for plaintiff's use, that under those circumstances we still retain the property to and the possession and control of those dies. We have never admitted that it is a contract, and we submit that under any reasonable interpretation it cannot be a contract, on its very wording.

We deny there was any other oral contract between the parties for the exclusive use of the dies.

We deny that there was any trust or confidential relationship existing between the parties.

If it becomes necessary to put on our proof in connection with that matter, we will prove that there was no confidential relationship, that we took the order for the dies, took their design—I mean, that we took the order for the extruded shapes, made the dies, produced them in accordance with the usual practice of Reynolds Metals Company, and there was never any trust or confidence or confidential [22] relationship, and if there was any, if it could be treated as such, that the Reynolds Metals Company never violated it in any manner by showing the designs or dies to anyone else.

We submit and intend to prove that there was no unfair competition because there was no competition. We have never been in competition with Panaview. We have never made doors, and we will so prove. We have made extruded shapes and component parts for doors which we have sold to Windsor and to many of the other competitors of Pana-

view, but have never made a door or sold it to the public. So under those circumstances there obviously can't be any palming off. This door has never acquired any secondary meaning. It is a door that you could go out tomorrow or I could go out tomorrow and buy, have somebody break down, extrude the component parts and sell the identical door to the public.

The Court: As I understand it then, the defendant admits that it made use of these dies in question to make extrusions, door shapes—

Mr. Duque: Yes, sir.

The Court: —identical with or substantially identical with those that it had made for the plaintiff.

Mr. Duque: Yes, sir.

The Court: And that those extrusions so made or component parts of doors made from them were sold to Windsor [23] and other competitors of the plaintiff.

Mr. Duque: Yes, sir. And we admit that other sets of dies identical to the dies that were made for Panaview were prepared by Reynolds Metals Company to produce extruded shapes identical to the Panador. We will prove that the Windsor Company, who was in competition with Panaview, came to Reynolds Metals Company with a Panador and said, "This door is on the market and has been on the market. We would like you to make the component parts and the extruded shapes." And they placed a contract with Reynolds Metals Company. We made the extruded shapes and component parts

and sold them to Windsor. And then Windsor, using those component extruded parts and adding to them the other hardware and other things necessary to build the door, such as the glass and other hardware, took the extruded parts that we made for them, made a door and competed with Panaview.

And that, briefly, your Honor, without going into deep detail is the defendant's—

The Court: Counsel's submission should limit the issues considerably, shouldn't it?

Mr. Mahoney: Yes, your Honor. He has admitted the fact that the door—that the extrusions were made from dies belonging to, or reserved at least under agreement, for the plaintiff; that Reynolds has used these dies.

Mr. Duque: Your Honor, we do not admit that we ever used any dies that belonged to Panaview. The dies that were [24] made—

The Court: The issue between you is as to whether the dies were reserved for the exclusive use of the plaintiff.

Mr. Duque: That is correct, your Honor. But there was never any question and could be no question that the dies at all times belonged to the Reynolds Metals Company and were in their sole possession and control at all times; and that they were never purchased.

The Court: I understand that the plaintiff doesn't make the contention that the plaintiff owned the dies, as such, or owned the property in the dies.

The plaintiff contends that it owned the exclusive use of the dies.

Mr. Mahoney: Well, your Honor, if paragraph 11 of the Acknowledgments is not applicable, and if the contention here is that it is not applicable to this situation and that the dies were not constructed in accordance with paragraph 11, then it is the contention of the plaintiff that it owns the dies outright because there then is no justification whatsoever, if the defendant here chooses to take that position, we will contend that we bought the dies outright.

The Court: Well, as I understand the defendant's contention it is, under this paragraph 11, that notwithstanding the fact that the plaintiff paid for the dies, that it is nonetheless the property of the defendant.

Mr. Mahoney: That is correct, your Honor. [25]

The Court: Is that a fair statement of the defendant's contention?

Mr. Duque: Yes, it is, your Honor.

Mr. Mahoney: That is correct.

The Court: Now, does the plaintiff dispute that question of ownership?

Mr. Mahoney: Your Honor, in accordance with the language of this agreement, the dies only remain the property of the defendant if they were made solely and exclusively for the use of plaintiff. And those are the only dies which remain the property of the defendant.

Now, if they contend that this provision of the Acknowledgments is not applicable here, then the dies were paid for by the plaintiff here and they

paid what is known as the die charge price. The sum of money on the invoice says "price." Next to the technical designation or die number there is a statement which is mimeographed which says "die charge."

The Court: Then the plaintiff contends that the defendant either wrongfully used either its dies, the plaintiff's dies or—

Mr. Mahoney: Or dies which it was holding, had title to but reserved for the exclusive use of the plaintiff.

The Court: Well, I have your point. You may proceed with the evidence. [26]

Do you offer the stipulation of facts?

Mr. Duque: We do.

The Court: Plaintiff's first exhibit?

Mr. Mahoney: Yes, your Honor.

The Court: It may be received in evidence as Plaintiff's Exhibit No. 1.

(The exhibit referred to was marked Plaintiff's Exhibit 1 and received in evidence.)

PLAINTIFF'S EXHIBIT No. 1

[Plaintiff's Exhibit No. 1 is set out in full, pages 39 to 41 of this printed record.]

Mr. Mahoney: I call Mr. Abraham Grossman.

The Court: That paragraph 11, do you have the document that that paragraph is contained in?

Mr. Mahoney: Yes, your Honor. By stipulation with the defendant, at the deposition, we now produce this document and will offer it in evidence as Plaintiff's Exhibit 2, if it will be so received.

The Court: Is it the so-called agreement with respect to the dies?

Mr. Duque: Sir?

The Court: Is this claimed agreement with respect to the dies?

Mr. Duque: This is what plaintiff claims to be the written agreement which relates to the exclusive use of the dies.

The Court: Is there any objection to receiving it in evidence? [27]

Mr. Mahoney: Your Honor, it should be pointed out that this is not the original Acknowledgment here.

The Court: But is a true copy?

Mr. Mahoney: It is a copy of an Acknowledgment which is typical of the Acknowledgment of Reynolds Metals Company. But at the time, and during the deposition, and I think Mr. Duque will recall, the plaintiff testified that it was its custom when these Acknowledgments were received to use them as confirmation and then to discard them. So the original of the document which actually covered the die charges is probably and presumably in the files of the Reynolds Metals Company. But it is identical with this.

The Court: Then both sides stipulate that this document is a true copy?

Mr. Duque: This document is a true copy and

contains the terms and conditions identical to the Acknowledgments which were sent to plaintiff by defendant in connection with the orders that were placed by the defendant.

The Court: So stipulated, Mr. Mahoney?

Mr. Mahoney: Yes, your Honor.

The Court: Then the document is received in evidence as Plaintiff's Exhibit No. 2.

(The exhibit referred to was marked Plaintiff's Exhibit 2 and received in evidence.)

PLAINTIFF'S EXHIBIT NO. 2

SALES CREDIT	TERMS	CUST ORD NO.	DATE	ORD	PROD ORDER NO.
24F25KAVICH	•PRO-FORMA INVOICE	P-1750	9/30/54	E-66410	
SOLD TO	SHIP TO				

PANAVIEW
13434 RAYMER ST.
NORTH HOLLYWOOD CALIF.

HOLD UP SHIPMENT UNTIL RECEIPT OF
CREDIT DEPARTMENT RELEASE
SAME



DESCRIPTION	PRODUCT CODE ETC.	PRICE	SCHEDULE		PAGE 1 OF 2 QUANTITY
			SHIPPING POINT	NOVEMBER	
#1X) 6063-T5 (63S-T5) EXT.SOLID SHAPE X 16 FT. 2 INCHES	17-10-6340	\$.4248			4,000#
			2		
2. DIE 10414-A (CUST PT #1X) 6063-T5 (63S-T5) EXT.SOLID SHAPE X 12 FT. 2 INCHES	17-10-6340	\$.4248			2,000#
			2		
3. DIE 10415-B (CUST PT #2X) 6063-T5 (63S-T5) EXT. SOLID SHAPE X 16 FT. 2 INCHES	17-10-6340	\$.4308			4,000#
			2		
4. DIE 10415-B (CUST PT #2X) 6063-T5 (63S-T5) EXT.SOLID SHAPE X 12 FT. 2 INCHES	17-10-6340	\$.4308			2,000#
			2		
5. DIE 10416-A (CUST PT #3X) 6063-T5 (63S-T5) EXT.SOLID SHAPE X 13 FT. 11 INCHES	17-10-6340	\$.4278			7,700#
			2		

SALES OR USE TAX STATUS B
FOR RESALE--CALIF.PERMIT #AG-52399

150

3. PACKING: STD.BOX (DO NOT PACK OVER 400# A BOX)

We acknowledge the receipt of your order and the above is an exact copy of our entry thereof. If there are any errors in or objections to the above, please notify us AT ONCE. If we do not receive such notice, it will be understood that you accept the basis on which we have entered your order and that fulfillment of the order will be undertaken and deliveries will be made under the terms and conditions of the contract evidenced by this Acknowledgment. Any attachments hereto must be referred to herein.

F. O. B. shipping point. Transportation charges not included. Freight, rail or truck rates will be pre-paid and allowed to destinations within the continental United States on net shipments of 500 pounds or more. Where two or more items are ordered for shipment at one time and such items aggregate 50,000 pounds or more, deduction will be made from prices applicable to those items on the following basis:

Items ordered in quantities 500 through 19,999 pounds each and aggregating 30,000 pounds or more—deduction of 8.80% per pound.

Items ordered in quantities 500 through 19,999 pounds each and aggregating 50,000 through 29,999 pounds—deduction of 8.00% per pound.

Items ordered in quantities of 20,000 through 29,999 pounds each—deduction of 8.00% per pound.

REYNOLDS METALS COMPANY

LOUISVILLE, KENTUCKY

WES 10/8

By *J. Meader*

OCT 14 1954

DATED

FORM R 999-192 REV. 2 93

Dells S.A.H.
Hutchins
10/10/54

TERMS AND CONDITIONS

1. Contract Between Buyer and Seller: This acknowledgment shall constitute the entire contract between Buyer and Seller with respect to the subject matter thereof, and said contract shall not be amended, modified or rescinded except by written agreement signed by an authorized official of each party.

2. Delays: Seller shall not be responsible for any failure or delay in delivery due to fires, floods, labor troubles whether or not due to fault of Seller or subdivision thereof, or any similar or dissimilar cause beyond Seller's control. For any cause whatsoever, whether beyond Seller's control or not, Seller's liability for failure or delay in delivery shall exclude consequential damages and shall not exceed the smaller of the following: (1) the difference between the original and the quantities as specified between at the date on which delivery is required, regardless if such market price is higher than the said price applicable to Seller, or (2) five percent (5%) of the price applicable hereunder to such material. In the event of inability of Seller for any cause beyond Seller's control, to supply the total demands for any material specified in this order, Seller may allocate its available supply among all Buyers including in contract which may be a consequence thereof.

3. Tolerances: The total order and each delivery hereunder shall be subject to standard shipping tolerances. Peynolds Metals Company

4. Warranty: Seller undertakes that products sold hereunder to Buyer shall be free from defects in materials and workmanship, and shall conform to specifications. This express warranty is in lieu of and excludes all other warranties, guarantees or representations, express or implied, by operation of law or otherwise. Upon receipt of definite shipping instructions, Buyer shall return all defective material or material not conforming to specifications to Seller for inspection by Seller or at Seller's election, subject to inspection by Seller. Material returned must be returned in good condition as when received, in view of such replacement or repair, Seller may refund the purchase price applicable to such material. Seller agrees to pay return transportation charges, or exceeding those which would apply from original destination on all defective material or material not meeting specifications. However, Seller shall be obligated for such charges when material returned proves to be free from defect and to meet specifications. Material which proves to be free from ability shall be limited solely to the replacement or repair or to refunding the purchase price applicable to defective material or material not meeting specifications. Seller shall not be liable for any consequential damages nor for loss, damage or expense arising out of or resulting from the use of the material including without limitation warehousing, labor, handling and service charges not expressly authorized by Seller and die equipment and machine usage.

5. Advice by Seller: The giving or failure to give advice or recommendations of any character by Seller, shall not impose any liability upon Seller nor to Buyer any license to the use of any of Seller's patents, trade marks or trade names.

6. Credits: All shipments to be made hereunder shall at all times be subject to the approval of Seller's Credit Department, and if the financial responsibility of Seller is unsatisfactory, or becomes impaired, or if Buyer fails to make any payment in accordance with the terms of the contract, then in any such event, Buyer may defer or decline to make any shipments hereunder except upon receipt of satisfactory security or cash payments in advance, or it may terminate a contract. Terms of payment shall be as set forth on the face hereof.

7. Assignment: This contract, together with all rights, liabilities and obligations arising thereunder, may be assigned wholly or in part by Seller to any one or more of the corporations subsidiary to or affiliated with Seller, without the necessity of prior notice to Buyer.

8. Taxes: In addition to the price specified herein, the amount of any present or future tax applicable to the sale, manufacture, delivery, use, and/or handling of material hereunder shall be paid by the Buyer.

9. Changes: Seller assumes no responsibility for any changes in the specifications outlined in the original order, unless such changes are confirmed in writing by Buyer and accepted in writing by Seller. Any price variation resulting from such changes shall become effective immediately upon the acceptance of such changes.

10. Price: (a) The price specified in this contract for any material or articles which are new or hereafter covered by a published list price of Seller may be changed by Seller at any time upon written notice to Buyer to conform with Seller's published list price current at the effective date of change. (b) The 90 days' written notice to Buyer. In the event Buyer is not willing to accept such increase pursuant to this subparagraph (b), Buyer shall so notify Seller writing within seven (7) days from receipt of the notice of the increase and that portion of this order to which such price increase is applicable shall be deemed canceled unless within seven (7) days from receipt of Buyer's notice, Seller gives written notice of its election to withdraw the proposed increase.

11. Equipment: Any equipment including rigs, printing plates or cylinders, dies and tools etc. which Seller constructs or acquires specifically and solely for an Order shall be and remain Seller's property and in Seller's sole possession and control. Any charges made by Seller therefore shall be for the use of equipment only. When Seller has not accepted orders from Buyer for products to be made with such equipment for a period of one year, Seller may then require Buyer to give disposition of the said equipment, and in the event such disposition is not given within thirty (30) days after such demand, Seller may without liability make such disposition as it sees fit or may store the equipment for the account of Buyer, charging Buyer for the storage charges.

12. Patents: If any material shall be manufactured or sold by Seller to meet Buyer's specifications or requirements and is not a part of Seller's standard offered by it to the trade generally in the usual course of Seller's business, Buyer agrees to defend, protect and save harmless Seller against all suits at law or in equity and from all damage claims and demands for actual or alleged infringement of any United States or foreign patent and to defend any suits actions which may be brought against Seller for any alleged infringement because of the manufacture or sale of any such material.

13. Point of Delivery: Delivery to carrier or point of shipment shall constitute delivery to Buyer and Buyer shall assume all risk for subsequent loss or damage. The fact that in some instances a different "F.O.B." point may be shown on the face hereof, or that all or a part of freight charges may be paid, assumed, or allowed by Seller, is for Buyer's convenience only.

14. Waivers: No waiver by Seller of any breach of any provision hereof shall constitute a waiver of any other breach or of such provision. Seller's use to object to provisions contained in any communication from Buyer shall not be deemed an acceptance of such provisions or as a waiver of the provisions of this contract.

15. Cancellation: This contract is subject to cancellation only upon Seller's accepting such cancellation in writing, and the effective date of such cancellation shall be the date of such acceptance. The date of such acceptance notwithstanding, Seller shall have the right to continue the processing of the materials affected to the point at which the processing can be halted with the least inconvenience to Seller under the circumstances. Payment of cancellation fees shall be made by Buyer upon receipt of statement of same. Cancellation charges shall not exceed the purchase price of the canceled portion of contract.

16. Claims: Any cause of action between the parties to the contrary notwithstanding at Seller's election any claim for breach of warranty, failure in delivery or otherwise shall be deemed waived by Buyer unless presented in writing to Seller within sixty (60) days of receipt of the material or in of claims of breach of warranty, or within sixty (60) days from date of required delivery in the case of other claims. No inspection or investigation of material by Seller, even though occurring after the period above specified, shall be deemed a waiver of this provision.

17. Routing: Routing, if any stated on Buyer's order is to be considered as a request only. If seller honors such request, Seller shall make transportation arrangements on the basis of most economical routing.

Form No. 327-157-RAC6

Dated in evidence November 18, 1955.

Mr. Mahoney: This is a duplicate. The front page has [28] no reference to this case.

Mr. Duque: Let's see that we have the right document.

Mr. Mahoney: We will put in evidence here page 1 of 2 of the document so that we may retain a copy of it.

The Court: Then page 1 comprises Exhibit 2, a single sheet with printing on both sides.

Mr. Mahoney: Yes, your Honor.

The Court: Very well.

Mr. Mahoney: And with the acknowledgment of the reverse thereof.

The Court: Very well. I understand. It is received pursuant to stipulation.

Will you please swear the witness?

ABRAHAM GROSSMAN

called as a witness on behalf of the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Abraham Grossman.

Direct Examination

By Mr. Mahoney:

Q. What is your name?

A. Abraham Grossman.

Q. What is your address?

A. 7509 Haskell Avenue, Van Nuys, California.

Q. What is your position with the plaintiff corporation? [29]

(Testimony of Abraham Grossman.)

A. I am the president.

Q. As president of the plaintiff corporation what are the functions which you perform?

A. I am the designer and engineer and production head.

Q. When you say you are the designer, what do you mean by that?

A. By conceiving any new product that the company goes into manufacture on. I conceive the idea, make the drawings for it, engineer it and put it into production and am responsible for it on through from that point.

Q. How long have you been associated with the plaintiff corporation in this capacity?

A. Since its inception.

Q. Have you been associated with any other corporations in similar capacities?

A. Yes. Glide Window Company.

Q. Have you designed sliding doors and windows for that company? A. Yes, I have.

Q. Now, when you design a sliding door or window, do you just go into the market place and copy what is available to you? Or do you—well, what is your procedure in this regard?

A. For the products that our company makes I conceive [30] the original design from all the observations and my previous background that allowed me to create something that could meet the conditions that I determined was not met by any other products on the market, any other similar products on the market.

(Testimony of Abraham Grossman.)

Q. Now, what are the essential elements of an aluminum frame sliding door from the point of view of the structural elements. Do extrusions play an essential part therein?

A. They play the most important part in the function and the operation of a sliding door.

Q. Have you ever, in your career as a designer for both Glide Window, Inc., and Panaview Door & Window Co., resorted to the utilization of conventional or stock extrusions in the fabrication and design of your door? A. Not at all.

Q. And why don't you do this?

A. Well, the component extrusions, as a whole, go to make up the door where each part is dependent on certain elements in the mechanics of the door that have to be specially designed to receive those elements. There is nothing on the market from my observation, nor has there been throughout the years that I have been in this field, in research and in what I have come across, determined that any stock part could be used for these, and as a result every single part of our products had to be designed specially for its [31] particular function.

Q. Mr. Grossman, will you explain how you are qualified by education and experience to enter into the designing of these shapes of extrusions applicable for the specific purposes which you mentioned?

Mr. Duque: I object, your Honor. I don't believe that has any bearing on any of the issues in this case. I object to that on the grounds that it is incompetent, irrelevant and immaterial.

(Testimony of Abraham Grossman.)

The Court: Well, is there any issue here but that this witness, or that the plaintiff did furnish the pattern for the die, or the design?

Mr. Duque: So far as I know, your Honor, there is no issue. He has testified and we do not contest it.

The Court: You do not dispute but that it is his creation?

Mr. Duque: We do not dispute that an original drawing which was submitted was apparently his creation.

The Court: Do you wish to ask him if it was then, Mr. Mahoney?

Mr. Mahoney: Yes, your Honor. I wish I could make an offer of proof here that the background of this witness is—

The Court: Well, he might not need any background. If he created it, that is the ultimate thing, isn't it? It will be assumed he was competent to do it because he [32] did it.

Mr. Mahoney: Yes, your Honor. But I think that the testimony of the witness here will go to prove that it takes more than just—

The Court: Very well. The objection will be overruled. I will hear the evidence.

The Witness: My background is architectural, and a number of years in the building field, and in manufacturing sliding doors for these structures right on the field site gave me the knowledge that started me off in the extrusion field.

Q. (By Mr. Mahoney): Now, Mr. Grossman, when did you first go into the manufacture of slid-

(Testimony of Abraham Grossman.)

ing doors which included as component portions thereof aluminum extrusions utilized as both sash and frame members?

A. In the latter part of 1948.

Q. And with what company was this association? A. With Reynolds.

Q. Were you associated with Reynolds as a designer?

A. Oh, you mean what company I was located with?

Q. Yes.

A. No. That was with the Glide Window Company.

Q. At that time did you have any experience with the ordering of material and extrusions from Reynolds Metals Company for sliding doors manufactured from your design for [33] Glide Windows, Inc.? A. Yes.

Q. Can you tell me what the procedure was which was followed in ordering such extrusions?

A. Well, from the original conception, drawings had to be made of each individual shape or each extruded shape. Those drawings were presented to the sales office of the Aluminum Company. The drawings, in turn, were sent to the engineering department of the Aluminum Company for having them redrawn on an individual piece of paper, and when they were all completed they would be sent back to me for my approval. And after checking to see if they were identical with my own original drawings, I would okay them and send them back,

(Testimony of Abraham Grossman.)
and from that point on the material was ordered
and the dies went into process.

Q. Now, at the time of your first employment
with Glide Windows, Inc., in designing aluminum
sash and frame sliding doors, did you ever have
any direct contact with any representative of the
Reynolds Metals Company in regard to the ordering
of dies?

Mr. Duque: To which question I object, your
Honor, on the grounds that it is incompetent, ir-
relevant and immaterial. This is an action for a
breach of contract between the plaintiff Panaview
Door & Window Co. and the defendant Reynolds
Metals Company, not between Glide Window Com-
pany and Reynolds [34] Metals Company.

The Court: I assume it is preliminary. Over-
ruled.

The Witness: My first contact was with Mr.
Harry Sargeant, then regional sales manager of
the Reynolds Metals Company.

Q. Did you ever discuss the policy of the Re却nolds
Metals Company in regard to the handling of
dies which were manufactured by the Reynolds
Metals Company in accordance with designs of the
customer, to the specific designs of the customer
and for which a die charge was made?

A. Yes, we went through all of that in detail.

Q. Can you tell the Court in your own words
what the gist of the discussion was, as you recol-
lect it?

(Testimony of Abraham Grossman.)

Mr. Duque: To which question I object on the grounds that no foundation has been laid as to time, place and persons present.

Q. (By Mr. Mahoney): Mr. Grossman, at what time did you have your first meeting with Mr. Harry Sargeant in regard to the discussion of the ordering of the extrusions from the defendant?

A. I don't remember the exact date; sometime in the middle of 1948.

Q. Was there any other person present at these discussions?

A. Yes, I believe a Mr. Matt Silvers and a Mr. Jerry Reznick were present. [35]

Q. Do you recall, in substance, what the discussion related to in regard to the dies?

Mr. Duque: If the Court please, I have no objection to the witness testifying as to what was said by him and what was said by Mr. Sargeant. But I do again object to any conversations in 1948 between Mr. Grossman, as a representative of the Glide Window Company, and Mr. Harry Sargeant, as a representative of the Reynolds Metals Company with regard to company policy.

The Court: What is your purpose?

Mr. Mahoney: Your Honor, here, and as you have seen from your review of the pleadings, there have been allegations that it is the custom of the Reynolds Metals Company particularly, and the custom of the industry as a whole, to utilize dies upon which a die charge has been made and which

(Testimony of Abraham Grossman.)

are manufactured from the designs of the customer for other parties.

The Court: Well, that's the defendant's contention, isn't it?

Mr. Mahoney: That is their contention.

The Court: Very well. This would be rebuttal, would it not?

Mr. Mahoney: Yes, your Honor.

The Court: I would assume you were eliciting an earlier conversation which in later dealings was not repeated because [36] it had been said formerly.

Mr. Mahoney: That is correct, your Honor. In this case Mr. Grossman, it will be proved, relied in all his dealings with Reynolds Metals Company, and subsequently as an officer of Panaview, upon this original conversation with Mr. Sargeant.

The Court: If it goes to the issue of a fiduciary relationship, it will be received on your case. But otherwise it would be rebuttal.

Mr. Mahoney: There is a direct chain here, your Honor.

The Court: You may proceed. The objection is overruled.

Q. (By Mr. Mahoney): Now, Mr. Grossman, can you recall what Mr. Sargeant said at that meeting regarding the policy of the Reynolds Metals Company as to the use of dies manufactured in accordance with the designs of a customer and upon which a die charge was made?

A. Well, only in words to the effect that among other things that we had to determine, inasmuch

(Testimony of Abraham Grossman.)

as we were just starting relationship with the company and we were relatively new in that field, as to our protection on our product by allowing Reynolds to manufacture the material for us, and it was clearly—Mr. Sargeant made us to understand that we would be protected in that the dies would be for our exclusive use.

And at that time I believe it was also stated that unless [37] a period of a year, I believe, no material was ordered from those dies, a letter for permission from our company would allow Reynolds to either destroy the dies or to give them permission to sell them to others.

But those were the explanations on that particular subject in regard to dies.

Q. Do you recall what position Mr. Sargeant held at that time with the Reynolds Metals Company? A. I believe he was sales manager.

Q. Was he sales manager of the extrusion department or of the parts department of the Reynolds Metals Company?

A. I believe it was the extrusion department.

Q. Now, Mr. Grossman, are you experienced with the nature of the different types of dies which are utilized by aluminum extruders and particularly with the general practice of the industry in that regard? A. I believe so.

Q. Now, are there provided by the various aluminum extruders standard part dies?

A. Well, there are what is known as stock dies, yes.

(Testimony of Abraham Grossman.)

Q. And what are these stock dies?

A. Well, these stock dies are various dies that have either been made by the aluminum companies for sale to the general trade, dies which have common shapes, as a rule and for which they have determined there would be a considerable [38] market for. And there are also dies that are undoubtedly dies that have belonged to former customers where the customer no longer had use for them, where they were obsolete, and they had given the company permission to sell material from those dies. Now, for these dies they do not ask a die charge. The price of material from these dies is identical on the sliding scale of quantity and weight as any material run through special dies that they do charge for.

Q. Now, are there any other dies which the aluminum extrusion companies provide for the use of a customer upon which a die charge is not made, other than the standard component dies which you have previously mentioned?

A. That a die charge is not made? Any other dies?

Q. Yes.

A. Unless it was a die for use of processing the aluminum, I would have no knowledge.

Q. Then to your knowledge is it true that when a special die, a die manufactured in accordance with the customer's specifications in the customer's design as ordered, a die charge is always made?

A. Yes.

(Testimony of Abraham Grossman.)

Q. Now, have you ever in your association with either Glide Windows, Inc., or with Panaview Door & Window Co., Inc., ever given the defendant any permission whatsoever to [39] utilize any of the dies which have been manufactured by Reynolds Metals Company and upon which a die charge was made?

A. No.

Q. Has the Reynolds Metals Company ever asked you for permission to utilize the dies of either of the companies with which you are associated, permission to use them for another customer?

A. Yes, they have.

The Court: When was that?

The Witness: That was sometime either the early part of this year or last year when they sent us a letter stating that dies that we had made some time ago, no material had been ordered.

The Court: Apparently your counsel is about to bring that out. I merely asked you because I thought he might be dropping the subject.

Q. (By Mr. Mahoney): I now show you Plaintiff's Exhibit No. 3 for identification.

Mr. Duque: What is that?

Mr. Mahoney: Plaintiff's Exhibit No. 3.

Mr. Duque: And is that what I have here?

Mr. Mahoney: Yes.

The Court: It is a letter, is it?

Mr. Mahoney: It is a letter directed from Reynolds [40] Metals Company, General Offices, Richmond, Virginia, on November 19, 1951, to Glide Windows, Inc., Burbank, California.

(Testimony of Abraham Grossman.)

The Court: Is it stipulated it was sent by the defendant on or about the date it bears, and received by the plaintiff in the regular course of mail?

Mr. Duque: May I ask Mr. Yates, whose name appears at the bottom of the letter, your Honor?

The Court: Yes.

(Whereupon, counsel conferred with defendant's representative.)

Mr. Duque: Yes, your Honor, Mr. Yates tells me this is a true and correct copy of a letter signed by him on or about the date it bears, and mailed to Glide Windows, Inc., of Burbank, California.

The Court: Do you offer it in evidence?

Mr. Mahoney: I now offer Plaintiff's Exhibit No. 3 in evidence.

The Court: It may be received in evidence.

(The document referred to, marked Plaintiff's Exhibit No. 3, was received in evidence.)

Q. (By Mr. Mahoney): I now show you Plaintiff's Exhibit No. 3, which has been stipulated to be a true copy, and ask you whether the initials which appear on the lower portion thereof are your initials? [41] A. Yes.

The Court: Is that the letter you referred to in answer to my question?

The Witness: Yes.

Q. (By Mr. Mahoney): And when your company received this letter did you find that it related to dies which had been manufactured specifically to

(Testimony of Abraham Grossman.)

the order of Glide Windows, Inc., and on which a die charge had been made? A. Yes.

Q. And when you reviewed this letter did you decide to give permission to Reynolds Metals Company to dispose of the dies as they saw fit, in conformity with the contract appearing on the back of their acknowledgment?

Mr. Duque: I object to that on the grounds that it is incompetent, irrelevant, and immaterial.

The Court: It would be immaterial, would it not?

Mr. Mahoney: It is not, I am sure, because I will tell your Honor what this letter discloses and what this—

The Court: The letter is in evidence, but it is immaterial whether he said yes or no in response, isn't it?

Mr. Mahoney: We are going to put in evidence a letter which will show an employee of the company actually did say "No."

Mr. Duque: Well, this letter—I don't know whether your Honor has had an opportunity to read it, but this isn't [42] a letter requesting his permission to use the dies for some other customer. This is a letter which is their form letter and which says that at the end of a period of time in which the dies haven't been used for a year, unless we hear from you to the contrary we are going to destroy them.

The Court: Very well. The objection is sustained to the pending question.

Q. (By Mr. Mahoney): Mr. Grossman, I now

(Testimony of Abraham Grossman.)

show you Plaintiff's Exhibit No. 4 for identification, which is a reply to the Reynolds Metals Company from Glide Windows, Inc., dated December 3, 1951.

The Court: Is it stipulated that the document is the reply sent to Reynolds Metals Company by Glide Windows, Inc., in response to Exhibit 3?

Mr. Duque: This is the first time that I have seen it. Could we have an opportunity at the recess to check it?

The Court: Subject to check, is it so stipulated?

Mr. Duque: We will check in our files. Yes, sir.

The Court: Very well. It is received, if you are offering it, as Exhibit—

Mr. Mahoney: I now offer Plaintiff's Exhibit 4 in evidence.

The Court: It may be received.

(The document referred to, marked Plaintiff's Exhibit No. 4, was received in evidence.)

Q. (By Mr. Mahoney): Mr. Grossman, did you personally review the copy of the letter, Plaintiff's Exhibit 4, which bears the signature of Mr. Max H. Resnick, and which it is contingently stipulated was forwarded to the defendant in response to its original inquiry of November 19, 1951? A. Yes.

Q. Did you have anything to do with the decision in regard to the sending of that letter?

A. Yes.

Mr. Duque: To which question I object on the grounds that it is incompetent, irrelevant, and com-

(Testimony of Abraham Grossman.)

pletely immaterial to any of the issues in this case, your Honor.

The Court: It shows his knowledge of the transaction. Overruled. The answer may stand.

Q. (By Mr. Mahoney): Then, Mr. Grossman, can you, as president of Glide Windows, Inc., and as president of Panaview Door & Window Co., state what your consistent policy has been with regard to the ordering of dies from aluminum extruders such as the defendant here, so far as the maintenance of your right to retain exclusive use to the dies in the possession of the extruder?

Mr. Duque: To which question I object on the grounds that it is incompetent, irrelevant, and immaterial; it calls for a self-serving statement.

The Court: Policy wouldn't be material, would it? [44]

Mr. Mahoney: Your Honor, we are trying to show here that never at any time did the plaintiff give its consent to the defendant's use of any of its dies whatever.

The Court: I would assume that is not in issue. Is it? Is there any contention that the plaintiff ever conferred any consent or permission upon the Reynolds Metals Company to use these dies, apart from that conferred in the original arrangement?

Mr. Duque: There is not. And in addition to that, the witness has already testified that he did not at any time give any consent.

The Court: That will cover it, then, won't it?

Mr. Mahoney: Yes, your Honor, that covers it amply.

(Testimony of Abraham Grossman.)

The Court: We will take the afternoon recess while you gentlemen are considering the document.

(Short recess.)

Mr. Mahoney: Your Honor, the defendant's counsel has graciously provided plaintiff with an acknowledgment of the die order which is referred to in the letter, Plaintiff's Exhibit No. 3. And this acknowledgment bears the date of customer order, 4-7-48, Customer Order No. 1, and states in the column "Sales credit," "42 Sargeant"; and also bears upon the face thereof other pertinent information relating to Order No. 1; and on the reverse thereof bears a printed form, "Terms and Conditions." In paragraph 12 there is [45] specific reference to equipment.

The Court: Do you offer it in evidence?

Mr. Mahoney: I now offer this document in evidence as Plaintiff's Exhibit No. 5.

The Court: Is it stipulated to be a true copy in all respects of what it purports to be?

Mr. Duque: It's stipulated to be the original, your Honor; and the only thing I would like the record to show is that it does come from our files, so that it may be returned at the conclusion of the litigation.

The Court: Very well. It may be received in evidence as Plaintiff's Exhibit No. 5.

— (The document referred to, marked Plaintiff's Exhibit No. 5, was received in evidence.)

109

PLAINTIFF'S EXHIBIT NO. 5 (Received in evidence Nov. 18, 1955.)
TO RE NOLDS METALS COMF NY

PLEASE ENTER OUR ORDER FOR THE FOLLOWING MATERIAL AT THE PRICES AND ON THE TERMS STATED HEREON

NO. OF CUST ORDER	CUST ORDER NO	PRODUCTION ORDER NO	SALES CREDIT	TERMS
-7-48	1		42 SARGEANT	
GLIDE WINDOWS, INCORPORATED 17221 PARTHENIA STREET NORTHRIDGE, CALIF.		S H I P T O CHANGE ORDER NUMBER 1		
		PROD 201 SHIP VIA		
CUST NO. ONE FROM PHOENIX		TERMS		
QUANTITY ORDERED		CUST ITEM	CORRESPONDENT	CREDIT BY
3,000#		1.	63ST-5 extruded shape. Customers part #1	63ST-51
12,000#		2.	63ST-5 extruded shape. Customers part #2	
300#		3.	63ST-5 extruded shape. Customers part #3	
300#		3A	63ST-5 extruded shape. Customers part #3A	
15,000#		4.	63ST-5 extruded shape. Customers part #4	
00#		5.	63ST-5 extruded shape. Customers part #5	
200#		6.	63ST-5 extruded shape. Customers part #6	
300#		7.	63St-5 extruded shape. Customers part #7	
SPECIAL MANUFACTURING INSTRUCTIONS AND QUALITY REQUIREMENTS RECORD NO		CHANGE ORDER NUMBER 1		
SPECIAL INSPECTION INSTRUCTIONS AND REC HOS		CHANGE ORDER NUMBER 1		
FULL PACKING INSTRUCTIONS				
INVOICE AND SHIPPING INSTRUCTIONS				
GENERAL INSTRUC. ONE				

ORDER IS NOT BINDING UPON SELLER UNLESS AND UNTIL ACCEPTED BY SELLER ON ITS REGULAR ACKNOWLEDGMENT FORM SIGNED BY SELLER. THIS ORDER IS GIVEN
 INTER, TWO IF ACCEPTED BY SELLER WILL BE FILLED BY SELLER UPON THE CONDITIONS SET FORTH ON THE BACK HEREOF, WHICH ARE HEREBY EXPRESSLY MADE A
 PART OF THIS ORDER.

PURCHASER

COMPANY

BY

NAME

TIME

Abi Rosenman Pres

(Testimony of Abraham Grossman.)

Mr. Mahoney: This is technically known as an "Acknowledgment," is it not?

Mr. Duque: That is correct.

Q. (By Mr. Mahoney): Mr. Grossman, I show you the acknowledgment, Plaintiff's Exhibit No. 5, and ask you if you recall the circumstances under which that order referred to therein was made?

A. Yes, I do.

Q. Would you outline briefly the history of that order?

A. Well, I can just say, very briefly, that the [46] procedure that preceded the actual order was identical to the sequence that I just previously stated, in that I supplied the original extrusion drawings which in turn were redone by the aluminum company, presented to me for O.K., and after that the order was processed; where the dies went into manufacture, and from them the aluminum would be run.

Q. And do the two letters, namely, Plaintiff's Exhibit No. 3 and Plaintiff's Exhibit No. 4, refer to dies which are listed in that order, Plaintiff's Exhibit No. 5? A. Yes, they do.

Q. I now show you a pencil drawing on drafting film which bears the designation, "Horizontal sliding door designed by Abe Grossman—4-1-54," and marked for identification as Plaintiff's Exhibit No. 6 for identification, and ask you if that is the original of the drawing which was presented by you to the Reynolds Metals Company as a preliminary to the preparation by that company of dies for the

(Testimony of Abraham Grossman.)

manufacture of extrusions for the Panador on behalf of the plaintiff here.

A. Yes, this is the original.

Q. Can you explain the designation "Full-Light" door in the lower right-hand corner thereof?

A. Well, this previously was a name that we had tied with that, but never actually was used in the final name given the door.

Q. Are the detail drawings of the various extrusions [47] shown in this drawing the extrusions which were utilized in the assembly of the Panador sliding door?

A. All except with a minor change, with the exception of a minor change on one part.

Q. Who made that minor change?

A. I did.

Q. Now, Mr. Grossman, I notice that there are certain designations which appear sequential, such as Part 1 X, Part 2 X, and so forth. What does that refer to?

A. These are the extrusion shape numbers. They are our company numbers. And we use them to define in our shop the various parts by that number.

Q. Are these extrusions copies of well-known shapes? Are these extrusion drawings?

A. No, they are not.

Q. Who created these shapes?

A. I did.

Mr. Duque: To which question I will object on the ground that it calls for a conclusion of the witness, your Honor. I have no objection to him testi-

(Testimony of Abraham Grossman.)

fying as to what he actually did. But the question of who created these shapes—

Mr. Mahoney: I will rephrase the question, your Honor.

The Court: Very well.

Q. (By Mr. Mahoney): When you made these drawings did you copy any shapes known to you in the art at the time at [48] which you made the drawings? A. I did not.

Q. Will you explain the nature of the cross-sectional drawings "Jamb" and "Sill," and so designated in Plaintiff's No. 6 for identification?

A. The sill is the bottom member of the frame surrounding the two panels, or any number of panels, of sliding sash.

The jam indicates the side members of that particular frame.

Q. Now, Mr. Grossman, in order that there may be no misunderstanding here, will you explain what your practice was and what the goals were in creating the particular design of the Panador aluminum-frame-and-sash sliding door?

Mr. Duque: To which question I will object, your Honor, on the ground that it is immaterial what his goals were or the other other portion of the question. The ultimate fact is that he prepared these drawings for extrusions and submitted them to the defendant.

The Court: Do you mean by that, what functional result did he attempt to achieve?

(Testimony of Abraham Grossman.)

Mr. Mahoney: Yes. How he was trying to better his product, and in what manner his product was different from the prior art, et cetera.

The Court: Very well. Overruled. You may answer. [49]

Q. (By Mr. Mahoney): Mr. Grossman, to be more specific, in the first place, at the time you conceived and developed and designed the extrusions and the entire assembly of the Panador sliding door, what factors did you have in mind?

A. One principal factor was to create a door that would have the quality that the sliding door needed to make it function well, both from the standpoint of operation and weatherproofing, and yet be very competitive. There was a very great need for a competitive door of this kind for the project or tract type of development that dealt with a mass marketing of merchandise. Up until the time that we came out with this door, all of the aluminum doors, even the most competitive on the market, were far too high in price for this particular type of business.

A door like this was needed principally because the rest of the windows in the house were more and more tending to go to aluminum, and up until the time an aluminum door that could be competitive enough to be used for that kind of a building came out, the contractor was forced to go to a very cheap steel door. The problem was to design a door that had the quality necessary to make it a good door and still make it a very competitive door. This was

(Testimony of Abraham Grossman.)

the problem. And we felt that by designing and coming out with a door like this that we had the problem licked.

Q. And can you explain briefly how the design of [50] the extrusions and the shapes and the assemblies shown in the drawing, Plaintiff's Exhibit No. 6 for identification, solved some of those problems; and particularly the problems of price and function?

A. Yes. Although in many respects the weight of material was not reduced considerably, as might be expected of a competitive door, the element of ease of fabrication was the most outstanding. And one of the principal features of this door included a method of a butt joint that would be sealed behind continuous vertical ribs on the side members of the sash as the members were screwed to the horizontal rails, forming that sash. This was the principal feature that enabled us to produce this door with as little labor as possible, and as a result was very competitive in price.

Q. And, Mr. Grossman, on Plaintiff's Exhibit No. 6 for identification, I notice that the various part numbers have dimensions on various portions of the cross-sections of the extrusions. Can you tell me who placed those dimensions on there?

A. I did.

Q. What was the purpose of these dimensions?

A. Those dimensions were there for the purpose of showing the aluminum company the exact shape and dimensions and the median line or the true line

(Testimony of Abraham Grossman.)

on which the tolerances had to be based. The tolerances, plus or minus, had to [51] revolve about these particular dimensions that were given.

Q. And why was this necessary?

A. So that the function of the fitting of adjacent parts and operating parts could take place so that within those allowable tolerances the items would work as efficiently as possible. Without this, some aspects of the mechanics of the door would operate, but many other important ones would not.

Q. Now, is it true, Mr. Grossman, that when your company, in its general practice, manufactures a door it does not ship an assembled door?

A. Not in the Panador, no.

Q. How is the door shipped?

A. It is shipped in a knocked-down form. Various pieces of extrusions already processed are packed in a cardboard crate, and it is then assembled on the job by the people supplying the glass.

Q. And did you design each of these extrusions to fit one within the other tightly and accurately so that a mechanic of ordinary skill in the field could assemble the frame and sash of the door without any extensive educational process?

A. That is correct.

Q. And is it essential in a door of this type that every one of the extrusions be carefully conceived so that it [52] performs its function in the entire assembly once it is assembled?

Mr. Duque: Your Honor, I haven't objected to these leading questions, but they are now getting to

(Testimony of Abraham Grossman.)

the point where I feel called upon to object to the question on the grounds that it is leading and suggestive.

The Court: Is there any issue about the answer that this would call for?

Mr. Duque: No, there isn't any issue. It is completely immaterial. But it can go on for some time. I also object to it on the ground that it is immaterial.

The Court: It might be helpful in describing for the record and the Court the function of some of these parts, the importance of them. Overruled.

You may answer.

The Witness: Could I hear that question once again, please?

Mr. Mahoney: Will the reporter read the question to the witness?

(The question was read by the reporter as follows: "Q. And is it essential in a door of this type that every one of the extrusions be carefully conceived so that it performs its function in the entire assembly once it is assembled?"")

The Witness: Yes. There are numerous factors that go [53] toward making the door successful or not successful, depending on that particular feature of the various extruded parts fitting with one another, and also having the proper receptacles within its shape to contain all of the other component parts such as weatherstripping and hardware that

(Testimony of Abraham Grossman.)

go directly toward the mechanical operation of the door.

Q. (By Mr. Mahoney): Mr. Grossman, will you relate the manner in which this drawing was submitted, Plaintiff's Exhibit No. 6 for identification, to the defendant, Reynolds Metals Company?

A. The drawing was submitted to one of the salesmen that approached us on a particular time that we were ready to submit these drawings to an aluminum company for extrusions.

Q. Do you recall the name of the salesman?

A. Yes, I do. Al Kavich was the name, K-a-v-i-c-h, I believe.

Q. Now, Mr. Grossman, when you presented the drawings to Mr. Kavich, the drawings which are Plaintiff's Exhibit No. 6 for identification, did you say anything to Mr. Kavich?

Mr. Duque: Your Honor, may we have a foundation laid?

I object to the question on the ground that there is no evidence as to time, place, and as to when the conversation took place.

Q. (By Mr. Mahoney): Mr. Grossman, when did you [54] originally submit the drawings, Plaintiff's Exhibit No. 6 for identification, to Mr. Kavich? A. It was in the spring of 1954.

Q. And was there anyone else present, to your recollection, at that meeting with Mr. Kavich?

A. This meeting, I believe, took place in our drafting room, and our draftsman was present and

(Testimony of Abraham Grossman.)

Mr. Resnick was present; my associate, Mr. Resnick.

Q. Do you recall the name of the draftsman?

A. Gene Ebright.

Q. Mr. Grossman, did you hand Mr. Kavich the drawing? Or was there a preliminary discussion?

A. There was preliminary conversation before I did that. Would you want me to relate that?

Q. You may.

A. The reason Mr. Kavich approached us—

Mr. Duque: If the Court please, I object to any statement as to the reason why anybody did anything. I have no objection to him relating the conversation that took place at that time.

The Court: Guide your witness, Mr. Mahoney.

Q. (By Mr. Mahoney): Mr. Grossman, you should not refer to the reason that any person with whom you dealt might have done something. Confine your testimony to the factual incidents and to the statements that were made by the party with [55] whom you were dealing.

A. Mr. Kavich told me that he had heard that Harvey Aluminum Company was going to get the opportunity to do these extrusions and supply us with material for this particular door, and that he could promise us to beat their schedule by three weeks.

Now, these essence of the success at this particular time in getting the spring market was so important that this particular detail of getting us the material three weeks sooner than we could at

(Testimony of Abraham Grossman.)

any other place was important enough for us to make a decision after promises that this schedule could be met. This was the essence of our conversation. And our minds were made up on that fact, to deal with Reynolds.

Q. Did you say anything further to Mr. Kavich prior to or at the same time as you presented the drawing, Plaintiff's Exhibit 6 for identification, to Mr. Kavich? A. Yes.

Q. What did you say?

A. We made Mr. Kavich aware of the fact—

Mr. Duque: Now, just a moment. If the Court please, I hate to keep interrupting. I have no objection to the witness testifying to what Mr. Kavich said.

Q. (By Mr. Mahoney): I will once again instruct you that such phrases, such as "we made the witness aware," are not apt here. You should say what you told the witness and [56] what the witness said in reply to your statement.

A. All right. I told Mr. Kavich that the product was so revolutionary in the respect of competition, and I also reiterated the need for such a product and told him of the vast potential for the company doing well with this at the right time, that we asked—I asked that he not let this information out and that it be held in strict confidence by his company for those reasons. We didn't want anyone getting wind of it because there was such a terrific need for it that we were concerned over the fact that

(Testimony of Abraham Grossman.)

competition might pick this up and beat us to the punch.

Q. At that time did you discuss dies with Mr. Kavich? A. Yes.

Q. What was your discussion regarding dies?

A. Only the technical aspects of dies.

Q. Did you discuss the possibility of the die charge being made for the individual dies which were necessary?

A. Only in that certain hollow shapes and certain sized dies were questioned as to what they might cost. But it wasn't questioned whether we pay or not pay, if that is what you meant.

Q. Why wasn't it questioned?

A. Well, this was tacit understanding. All our history has proven that that's the way dies have been made for us, by this specific charge, by formula, because of certain sizes. [57]

Mr. Duque: To which I move, your Honor, that the answer be stricken as not responsive to the question. It is a self-serving statement of the witness.

The Court: Does the motion go to the entire answer?

Mr. Duque: Pardon?

The Court: Is your motion directed to the entire answer?

Mr. Duque: Yes, your Honor.

The Court: The motion is denied.

Q. (By Mr. Mahoney): Mr. Grossman, I show you Plaintiff's Exhibit No. 7 for identification,

(Testimony of Abraham Grossman.)

which is a model of the Panador aluminum-frame sliding door, and I request that you very briefly analyze the manner in which the door functions, the manner in which it is set up in the field, and other pertinent factors relating to the Panador aluminum-sash-and-frame sliding door.

A. I will try to do it very briefly and as clearly as possible.

This is a model of the door, and although the sections are in full size, the model itself, of course, is reduced to a much smaller size.

Now, these are the sash members (indicating). Now, if I can get one of these out—

Would you help me here?

Mr. Mahoney: It might be explained that the frame is normally installed in the building and, of course, is [58] immovable.

The Witness: Now, in one of the sash the weather stripping has a particular tension on the track so that the door will be prevented from rattling. The function of fit with that particular type of weather stripping has to be so constructed from the extrusion itself that it is applied and set in easily without any other problems. Once it is set in and staked into position, and the space between these two pieces of weather stripping is so adjusted in the tolerance of the extrusion that the door operates with complete weather contact of that weather stripping—

The Court: That is done by some other means than the extrusion itself, is it not?

(Testimony of Abraham Grossman.)

The Witness: Yes. But the receptacle for that weather stripping has to be so designed in the extrusion itself so that the normal tolerance, the commercial tolerances in the extrusion are so constructed that if the extrusion comes in with a minus tolerance, this space should be closed to such a degree that when the weather stripping is put in, the door shouldn't be too tight; or, if it is constructed with a tolerance where it is as wide as possible in an open position, it still maintains weather contact with the—

The Court: That unique feature is something wholly apart from the extrusion, isn't it?

The Witness: No. The extrusion is responsible for the [59] success of this particular weather stripping.

The Court: Well, explain that to me. That is what I don't understand.

The Witness: In other words—

The Court: Which is the extrusion?

The Witness: The extrusion is the aluminum.

The Court: That is what I understood. So if you take a piece of aluminum with a valley in it that wide and by adjusting what you put inside it you would get the same result, wouldn't you?

The Witness: No, because what you put inside it is also constant. You see, this material varies, your Honor. It comes to us in all of the allowable tolerances of normal commercial extrusions.

The Court: Well, does that have something to do with the design?

(Testimony of Abraham Grossman.)

The Witness: Yes, specifically, because this is designed so that within those normal tolerances we still get the proper pressure on both sides of the tolerance lines. That will still allow the door to function and operate with the benefit of this weather stripping. Otherwise, it is either going to be operating with such a tight fit that it would make it almost impossible to—

The Court: It would either rattle or bind?

The Witness: That's correct, it would either rattle or [60] bind. And if it rattles it is no good, and if it binds it can't be operated. So those are the specific details of making a door a good one or a bad one.

Now, the same thing holds true on the bottom. We will have the same conditions.

Now, these are just the important aspects of the weather stripping in the door. But the fit of this joint where the rail—you can see it very clearly here. That rail is set between two ribs as it is secured.

Well, in the field any mechanic, even a bad one, can put that door together. And that joint can't possibly look bad, because it is completely covered by that rib in a continuous form on all sides of the door. So we are not relying on skilled labor to put it together. And yet all adjustments can be made without any gaps appearing at the joint. These are the principal features of the door.

By the use of this type of joint, all that needs to be done—this part is just cut off and a part put

(Testimony of Abraham Grossman.)

in here, a tap part with a screw, and anybody can put a sash together in a matter of minutes. In other words, the glazier actually supplies the glass. These fit around the glass, and the door is automatically glazed at that particular time.

So with the ease of construction and the field installation, we felt we really had a very competitive item that met with huge success in the [61] field.

Mr. Mahoney: I now offer Plaintiff's Exhibits Nos. 6 and 7 for identification in evidence.

Mr. Duque: No objection.

The Court: Received in evidence.

(The document referred to, marked Plaintiff's Exhibit No. 6, was received in evidence.)

(The model door referred to, marked Plaintiff's Exhibit No. 7, was received in evidence.)

Q. (By Mr. Mahoney): Mr. Grossman, after you submitted the drawing, Plaintiff's Exhibit No. 6, to Mr. Kavich, what happened after that?

A. Mr. Kavich then took the drawing back to his office, and sometime afterward we received drawings of the extruded parts on separate pieces of paper from Reynolds Metals Company, which I O.K.'d. And from that point on they were sent back and extrusions made.

Mr. Mahoney: Will you mark this for identification.

(The document referred to was marked Plaintiff's Exhibit No. 8 for identification.)

(Testimony of Abraham Grossman.)

Q. (By Mr. Mahoney): I show you Plaintiff's Exhibit No. 8 for identification, in conjunction with Plaintiff's Exhibit No. 6, and ask you to make a comparison of the drawings of Plaintiff's Exhibit No. 8 and Plaintiff's Exhibit No. 6 to determine whether the extrusions, the extruded shapes shown in the drawing, Plaintiff's Exhibit No. 8 for identification, [62] are identical with the drawing, Plaintiff's Exhibit No. 6.

A. The extruded shapes are identical with the exception of one extrusion which I revised very shortly after the initial drawing, after the original drawing was handed to Reynolds. And there are several additional drawings here that came subsequent to the original drawing.

Q. When you say "came," you mean they came from Reynolds?

A. No. I presented the drawing in the same manner to Reynolds.

Q. Now, did Reynolds Metals Company, and more particularly the extrusion division thereof, ever materially vary the configuration of the shapes?

A. No, they are identical, substantially identical, to my original drawings.

Q. Did they ever provide you with design assistance or tell you how to make extrusions so you could make a better aluminum-frame-and-sash sliding door? A. No.

Q. Have you compared, in general, the dimen-

(Testimony of Abraham Grossman.)

sions shown on the drawings in Plaintiff's Exhibit No. 8 for identification with the drawings in Plaintiff's Exhibit No. 6 for identification?

A. Yes.

Q. And are these dimensions substantially the same? [63] A. Yes.

Q. Now, Mr. Grossman, when you received this sheaf of drawings from the Reynolds Metals Company extrusion division, what did you do with them?

A. I perused them for possible errors, which sometimes happens. The draftsmen sometimes will miss a dimension from my original drawings or misunderstand something. And after doing so, after determining that the dimensions were the same as my drawings, I put an O.K. on it and signed it and sent it back to them which is their indication to go ahead with the processing of the dies.

Q. What was the purpose of submitting these drawings, Plaintiff's Exhibit No. 8 for identification, to you?

A. Well, being the conceiver of these various shapes—where by themselves they may be meaningless but yet all together where they function with one another, somebody has to have the authority to O. K. them for that particular purpose. And, knowing my position, these drawings were sent to me for that purpose, and I determined whether they were correct for that purpose. And that was the reason for the O. K.

Q. Now, Mr. Grossman——

(Testimony of Abraham Grossman.)

Mr. Mahoney: Well, I now offer Plaintiff's Exhibit No. 8 in evidence.

The Court: Is there any objection? [64]

Mr. Duque: I would like just a moment, your Honor, if I may, to check them with our file.

The Court: You may.

Mr. Duque: No, we have no objection.

The Court: Received in evidence.

(The document referred to, marked Plaintiff's Exhibit No. 8, was received in evidence.)

Q. (By Mr. Mahoney): Mr. Grossman, on the face of each of the drawings which constitutes a part of Plaintiff's Exhibit No. 8, there is a notation "Revised." Can you tell us the meaning of this notation?

Mr. Duque: I am sorry, Mr. Mahoney. I didn't get part of your question.

Mr. Mahoney: Will the reporter read the question, please.

(Question read.)

Mr. Duque: I am trying to find the notation on the drawing.

Mr. Mahoney: Here it is (indicating).

Mr. Duque: Oh, "Revised." I thought you said "Advised."

The Witness: I have no knowledge as to why it was done or who did. There seems to be an error or some misunderstanding, because there are no revisions from the original we got or from my original

(Testimony of Abraham Grossman.)

drawings. So, as far as I can say, someone just misunderstood and wrote that on the prints that we received from Reynolds. [65]

Q. (By Mr. Mahoney): Mr. Grossman, during your association with either Glide Windows, Inc., or Panaview Door & Window Co., have you ever had brought to your attention, prior to the present litigation and the facts out of which the present litigation arises, the use by Reynolds Metals Company of dies belonging—of dies which were ordered from Reynolds Metals Company in conformity with original drawings presented by you or by your company, or either of those companies, to Reynolds Metals Company?

Mr. Duque: To which question I object on the grounds that it is incompetent, irrelevant, and unintelligible.

Mr. Mahoney: I think counsel has a good point there. I think I will start all over again.

The Court: Very well. You may rephrase it.

Q. (By Mr. Mahoney): So far as your association with Glide Windows, Inc., is concerned, do you know of your own knowledge at any time Reynolds Metal Company used dies which were ordered by Glide Windows, Inc., from Reynolds Metals Company to be manufactured in accordance with drawings presented by you for the manufacture of extrusions for other customers of Reynolds Metals Company?

Mr. Duque: Just a moment, if the court please. I object to the question on the grounds that it is

(Testimony of Abraham Grossman.)

incompetent, irrelevant, and still unintelligible to me; and on the further grounds that it is not the best evidence and calls for a [66] conclusion of this witness.

Mr. Mahoney: Well, your Honor, in the present instance what we are attempting to show here is that at no time in the history of the relatively lengthy relationship between the defendant, as an executive of both corporations, and both corporations themselves with Reynolds Metals, has Reynolds Metals ever asserted the right to use any of the dies, which it has manufactured for the account of either of those corporations, for its own purposes or for the benefit of another customer.

The Court: According to his understanding?

Mr. Mahoney: According to his understanding.

Mr. Duque: This is limited to his own knowledge?

Mr. Mahoney: I said his own knowledge, yes.

The Court: His understanding?

The Witness: No.

Mr. Mahoney: Your Honor, we have a rather technical problem here. We have here two containers. One is a container bearing a label, "Panadore aluminum sliding door," and containing the actual extrusions and the components as shipped. And the other is a container which bears the label, "Windsor aluminum sliding door."

The Court: You have photographs of those, do you not, attached to some of the affidavits?

(Testimony of Abraham Grossman.)

Mr. Mahoney: The containers, we do, but not the [67] contents.

The Court: Yes.

Mr. Mahoney: And Mr. Grossman here is most competent to review these extrusions and to point out the similarity between the extrusions sold by Windsor and the extrusions sold by Panaview.

The Court: May it be stipulated that they are substantially identical for the purposes of this case?

Mr. Duque: I haven't seen them, your Honor, but I will be glad to have our Reynolds Metals engineer look at them, and if they are substantially identical we will so stipulate. If they aren't, we will point out the differences.

The Court: If they both came from the same dies, I would assume it could be stipulated that they are substantially identical.

Mr. Mahoney: What we want to demonstrate to your Honor is the fact that when these extrusions were shipped from the parts department of Reynolds Metals Company they were shipping, for all intents and purposes, not naked and raw extrusions such as they shipped to the plaintiff, but they were shipping substantially all of the components, with a few exceptions, of an aluminum-frame-and-sash sliding door, in the same manner as the plaintiff here would ship it, to Windsor.

Will they stipulate to that? [68]

Mr. Duque: We will stipulate to what I just said.

The Court: Perhaps you can compare the con-

(Testimony of Abraham Grossman.)

tents of those two containers and get up a stipulation over the week end.

Mr. Mahoney: That might be a very good idea, your Honor. And then we could avoid burdening the record with 8-foot boxes and avoid burdening your Honor with a time-consuming comparison.

The Court: Very well.

Mr. Mahoney: We will meet, then, well, not over the week end, but perhaps Monday morning, and review the contents of these boxes and perhaps make a list—

Mr. Duque: May I suggest that we meet at a mutually agreeable time rather than fix the moment right now?

Mr. Mahoney: Certainly. That will be fine.

The Court: Very well, gentlemen. Just so you are ready with it by Tuesday morning.

Q. (By Mr. Mahoney): Now, Mr. Grossman, you have previously testified from Plaintiff's Exhibit No. 6, which is already in evidence, that the dimensions and the shapes of the extrusions shown in that drawing originally presented by you to the defendant here and the dimensions of the extrusions shown in Plaintiff's Exhibit No. 8 were substantially identical. A. Yes. [69]

Q. Now, Mr. Grossman, if you, as a manufacturer of aluminum sliding doors consisting largely of aluminum extrusions, were to attempt to make a copy of an aluminum-frame-and-sash sliding door such as the Panador, would this be a simple task?

A. It wouldn't.

(Testimony of Abraham Grossman.)

Mr. Duque: I object on the grounds that it is incompetent, irrelevant, and immaterial; conjectural; and has no bearing on any of the issues in this case, what Mr. Grossman might do as a manufacturer if he were to take down somebody else's doors.

The Court: What is the purpose of it?

Mr. Mahoney: The purpose of this question, your Honor, is to show that it would not be a simple task for anybody to take a structure of the relative complexities that this consists of, as it does, of numerous extrusions, to measure up each extrusion without the knowledge behind it that goes to make up the working assemblage and easily and quickly get into the market in competition with the manufacturer originally manufacturing the device—that this would be a time-consuming, expensive, and laborious procedure.

The Court: You mean to someone starting—

Mr. Mahoney: From scratch.

The Court: I don't think you need any evidence on that. It would be a matter of common knowledge, wouldn't it? [70]

In the first place, someone would have to produce the drawings and then someone would have to produce the dies and then you would have to get in production with it.

Mr. Mahoney: Well, your Honor, if the defendant wishes to stipulate to that. This is a subject—

The Court: Well, even if they refuse to stipulate to it, I would assume it was so.

(Testimony of Abraham Grossman.)

Mr. Mahoney: A subject for judicial notice, then?

The Court: I should think so.

Q. (By Mr. Mahoney): Now, Mr. Grossman, when did you first learn that the Windsor Supply Company or the Windsor Manufacturing Company was manufacturing or selling aluminum-frame sliding doors substantially identical with the Panador aluminum-frame-and-sash sliding door?

A. Sometime in February of this year.

Q. What did you do when you discovered this?

A. We tried to determine if, first of all, it was actually a fact that the materials used were the same materials, or dies. And through careful analysis in our plant and eventually in testing laboratories, getting photo-micrographs of the parts themselves, to prove that the dies, similar to fingerprints for identification, were actually the same, and that the die markings in every way proved that they were the same dies that our material was run from.

Q. And how did you determine this? Did you have a [71] sample of the—

The Court: Does it matter?

Mr. Mahoney: It doesn't matter. It's admitted.

The Court: It's admitted.

Mr. Mahoney: Your witness.

The Court: If he had known they were going to admit it, he wouldn't have needed to determine it, would he?

(Testimony of Abraham Grossman.)

Mr. Mahoney: No. We would have saved a lot of money.

Cross-Examination

By Mr. Duque:

Q. Mr. Grossman, you say that you entered the manufacturing of windows, that business, in 1948?

A. Yes.

Q. What did you do before that?

A. I was in the building field as a contractor, building contractor, building modern homes.

Q. Have you any engineering training or background? A. Architectural.

Q. Architectural. I understand. But engineering? Have you gone to an engineering school?

A. Only what went with the architectural course; no particular course.

Q. Where? A. At USC. [72]

Q. And you graduated as an architect?

A. No, I didn't graduate.

Q. What engineering courses did you take at the University of Southern California?

A. Only what engineering went with the first two years of architectural study.

Q. And what engineering is that, please?

A. Relatively simple engineering, with structure.

Q. Now, you say that the first meeting that you had with anybody connected with Reynolds Metals Company was in the middle of 1948, is that correct?

A. Approximately.

Q. That is when you say you met with Mr.

(Testimony of Abraham Grossman.)

Harry Sargeant? A. Yes.

Q. Did I understand your testimony to be that at that time he was sales manager of the extrusion division of Reynolds Metals Company?

A. I understood it to be that.

Q. And at that time you met with him and Mr. Silvers and Mr. Jerry Reznick?

A. Yes, as far as I can remember. There might have been a Mr. Max Resnick there also, or instead of Jerry Reznick. That is something I don't recall.

Q. You aren't sure whether it was Jerry or whether it was Max? [73] A. That's right.

Q. In any event it was either one of them?

A. Or it could have been both.

Q. You don't recollect?

A. I remember we went as a group.

Q. Pardon?

A. We went as a group. I did not go alone.

Q. And that meeting took place where, Mr. Grossman?

A. That took place in a building that Reynolds' offices were located in, 12th and Beacon Streets, I believe.

Q. Now, at that time you were talking to Reynolds Metals about producing extrusions for a sliding window, were you? A. Yes.

Q. You weren't in the sliding-door business at that time, were you?

A. We had sliding doors ready to go on extrusions, but at that particular time we started with the window.

(Testimony of Abraham Grossman.)

Q. Your first discussion with Mr. Sargeant then related to extruded shapes for windows and not doors? A. Yes.

Q. Is that correct? A. That is correct.

Q. Now, you say that at that time Mr. Sargeant made some statement to you in connection with the use of the dies [74] which would be made?

A. Yes.

Q. Do you have a clear recollection of what Mr. Sargeant said?

A. Yes. This was in the form of a general educational process that Mr. Sargeant was giving us as a group, inasmuch as our experience—we didn't know these things and we had to have these clarified before we did business.

Q. So Mr. Sargeant was giving you an educational dissertation on the subject?

A. That's right.

Q. At that time did Mr. Sargeant have before him any of the acknowledgments or terms and conditions which were sent by Reynolds Metals Company to its customers when they received an order?

A. I don't recall. This was a verbal conversation that I do recall.

Q. Will you tell me again just what Mr. Sargeant told you with regard to the use of the dies, please?

A. Well, not word for word, but words to the effect that—and what brought this into the conversation principally was our particular worry about

(Testimony of Abraham Grossman.)

what protection we would have on an item that we were giving to a company and were strictly at the mercy of that company's confidential relationship with us, what protection we would have for [75] the material we got from those dies. And it was simply put that the dies that we bought and paid for the use of would be strictly for the material, our exclusive use, as far as the material run from them was concerned.

Q. Did Mr. Sargeant ever tell you that you were going to buy and own any these dies?

A. No, he did not.

Q. Did he ever tell you that all that you got was the use of the dies and that the service charge—

A. The exclusive use of the dies. That was very clearly determined before we went further.

Q. And did he tell you that for the use of the dies you were paying a service charge?

A. I don't recall any such definition. All I know is that we paid for the dies but could not take them from the aluminum company. But we had exclusive use of all material run through those dies.

Q. And did he tell you that the dies belonged to you?

A. I don't recall if we went into that. I was only interested, and the rest of my group was only interested, in protection, as far as preventing others from taking the same material and using it in competition with us. And we were made to understand that the material would be exclusively for our use.

(Testimony of Abraham Grossman.)

Q. Were the shapes or the designs or drawings that you [76] had—were they patented?

A. No, they weren't patented at that time.

Q. Was there anything about the drawings or shapes—

Mr. Mahoney: Objection, your Honor. I think there should be more clarification as to what drawings and what shapes are being discussed.

Mr. Duque: Well, I am talking about the drawings and shapes he alleged he submitted after his first conversation with Mr. Sargeant.

The Court: Those would be the drawings of Exhibit 6 and Exhibit 8?

Mr. Mahoney: This points up the difficulty—well, Mr. Duque is in a position to explain it more thoroughly.

Mr. Duque: Well, your Honor, there is—

The Court: Are the drawings in evidence yet?

Mr. Duque: No.

The Court: The drawings are not yet in evidence, that you are speaking of?

Mr. Duque: No. The drawings that I am referring to are the drawings which he apparently submitted here—in evidence, no. They are not in evidence, your Honor. They relate to the ones that the letter of Mr. Yates sent, dated November 19, 1951, which is Exhibit 4, and the answer, which is Exhibit 5.

The Court: Well, where are those drawings? Are they here? [77]

(Testimony of Abraham Grossman.)

Mr. Duque: They aren't in evidence, your Honor, but they are referred to in those two pieces of correspondence, and it is to those drawings that I am now referring.

Mr. Mahoney: Mr. Grossman, could we obtain copies of those drawings from your files?

The Witness: I believe so. They are so old, though.

Mr. Mahoney: Do you desire that we produce copies of those drawings?

Mr. Duque: It would be interesting, yes.

The Witness: We might have some.

The Court: You are referring in your questioning, as I understand it, Mr. Duque, not to Exhibits 6 and 8—

Mr. Duque: No, your Honor.

The Court: —but to subsequent drawings submitted to the defendant?

Mr. Duque: To previous drawings, your Honor.

The Court: To previous drawings?

Mr. Duque: Yes, the drawings which are referred to in Exhibit 3 and Exhibit 4.

The Court: Do you understand?

The Witness: Yes. If I might add, those were the original drawings that we started business on, and that product is now obsolete and has been for a number of years.

The Court: By "we," you are referring to whom?

(Testimony of Abraham Grossman.)

The Witness: The company. [78]

The Court: Which company?

The Witness: The Glide Window Company.

The Court: I suggest that you specify the company in each instance.

The Witness: I will try to do that.

The Court: Either specify Glide or Panaview, and then we will know to which you are referring.

The Witness: I will try to do that, your Honor.

This is the original product that we had, and the Glide Window Company has gone into another product that a patent has been gotten on, and this product that we are now speaking of is obsolete. I might have difficulty in locating those drawings.

The Court: Was there any patent ever applied for, design or otherwise, on any of the drawings?

The Witness: Yes, on all the drawings.

The Court: But no patent ever issued?

The Witness: On that particular one, no, because we dropped that in favor of a more improved window, and we followed through with a patent on that and obtained it.

The Court: There is no patent involved in this suit, as I understand.

Mr. Duque: No, your Honor, there are no patented materials, and I wanted to make sure that I was correct in my understanding that any of these as far back as the Glide [79] drawings and up through the Panador drawings and the doors and windows, there are no patents involved in this litigation.

(Testimony of Abraham Grossman.)

The Court: Is that agreed, Mr. Mahoney?

Mr. Mahoney: So stipulated.

Mr. Duque: Maybe I can approach it in this manner:

Q. Mr. Grossman, when you had your first conversation with Mr. Sargeant and he gave you that educational dissertation on the methods of operation, after that did you submit any drawings to Mr. Sargeant for the purpose of having Reynolds Metals Company produce extrusions?

A. We presented—I don't recall if I presented it personally to Mr. Sargeant, but a representative of Mr. Sargeant, certainly, and—well, yes, we did have these drawings submitted to the Reynolds Metals Company.

Q. At that time, after you submitted the drawings and submitted the order, did you get an acknowledgment? A. Yes.

Q. Now, are the die numbers which are referred to in Plaintiff's Exhibit No. 3, which is the letter from Mr. Yates to you, are they the dies that relate to the drawings which you say were made after the original conversation with Mr. Sargeant?

A. They are.

Q. They are? A. Yes. [80]

Q. Now, referring to this letter—do you have it in front of you, Mr. Grossman?

A. The letter sent to the Glide Window Company?

(Testimony of Abraham Grossman.)

Q. The letter of November 19, 1951?

A. Yes, I do.

Q. I believe in your direct testimony you stated that that letter was a letter asking for your permission or consent to use the dies, which had been made to produce extrusions for Panaview, for some other competitor of yours. Is that what you believe that letter said?

A. My impression—I haven't read this letter for some time.

Q. Would you read it, please, and point out to me the portion of it in which Reynolds Metals Company asks for your consent to use those dies for another customer, or for a competitor, please?

A. That wouldn't be necessary, if I can explain my answer.

Q. Would you mind reading the letter, so that you will be acquainted with it, and then pointing out to me where the consent is?

A. The consent isn't here—the asking for consent to do that. They were asking for consent to do something else. I misunderstood.

Q. So that the letter does not purport to be what you [81] said it was, a letter requesting your consent to use the dies for another customer, is that correct?

A. No. It asks for maintaining the dies and storing the dies. And they want to know if they still should do that or destroy them.

Q. And then, following that, you replied with the next exhibit, which I assume you have in front

(Testimony of Abraham Grossman.)

of you, which is Exhibit No. 4, and in that letter you requested that they continue to store the dies, is that correct? A. Yes.

Q. Now, at the time that you received the acknowledgement which relates to these same dies that are referred to in this letter, did you read the acknowledgement?

A. I don't recall if I did. I probably did.

Q. Were you acquainted with the form of acknowledgement that was used by the Reynolds Metals Company at that time?

A. I believe I was at that time. I don't recall now just the exact details.

Q. Now, will you read paragraph 11 of that acknowledgement which was sent to you in 1951, please, sir? A. 11 or 12?

Q. 12 in that one.

Mr. Mahoney: Objection, your Honor. The document speaks for itself.

Mr. Duque: I am just asking him to read it so he will [82] know what is in it. It is preliminary to another question.

The Witness: "Equipment"—

Mr. Duque: I don't mean to read it out loud. Read it to yourself so that you will know what's in it.

(Witness examines document.)

The Witness: All right. I have read it.

Q. (By Mr. Duque): And that acknowledgement which was sent to you at that time confirmed

(Testimony of Abraham Grossman.)

your understanding that the dies would be used only for your use, is that correct?

A. Yes, it does.

Q. Very well. Now, as other dies were ordered by Glide and Panaview, did you read the acknowledgements that were sent to you?

A. I don't recall if I read every one, but occasionally we discussed this. In our history in relationship with other suppliers it all seemed to be the same, and these seemed to be identical with all the other companies.

Q. In other words, the terms and conditions of the Reynolds Metals Company acknowledgement were, as far as you were concerned, identical to Harvey—

A. As far as meaning was concerned, we feel they were identical.

Q. When you first submitted the drawings to Reynolds Metals Company with regard to the Panador—I am now up to date and we have passed by the Glide era and we are in the [83] Panador era now—when you first submitted Exhibit 6, do I understand that all of these drawings were made by you personally? A. Yes, they were.

Q. And they came from your own mind and were not copied from any other drawing?

A. They absolutely were not.

Q. Have you ever heard of Sweet's catalog?

A. Yes, I have.

Q. Have you ever read it?

A. Thoroughly.

(Testimony of Abraham Grossman.)

Q. Have you looked at extrusions and shapes that are in Sweet's catalog? A. I have.

Q. And, so far as you know, these drawings that you say you produced are not in any way similar to any of the ones that appear in Sweet's catalog?

A. I would say none of these drawings could be superimposed on other extrusions and be in any way matching.

The Court: Gentlemen, these drawings that you refer to, are they in evidence?

Mr. Duque: Yes, your Honor, they are Exhibit 6.

The Court: Let's refer to it by exhibit number.

Mr. Duque: I am sorry. I thought I had, your Honor. I thought when I first started asking him that I identified it [84] by number.

The Court: Do you understand?

The Witness: Yes, your Honor.

Q. (By Mr. Duque): You do have Exhibit No. 6 in front of you? A. Yes.

Q. And you understand that my previous questioning related to Exhibit No. 6?

A. Yes. I believe I answered your question.

Q. But I mean, I want to clarify it because his Honor indicated possibly that you did not have reason to know I was referring to Exhibit 6 all during this line of questioning.

A. It was clear.

Q. I wanted to make sure that you did.

A. It was clear.

Q. Thank you. Now, you say that after this

(Testimony of Abraham Grossman.)

question—and you say that, so far as you were able to ascertain, the two are identical—Reynolds Metals Company made no changes in your original drawings? Is that your testimony?

A. No. There was one part where some changes were made, but Reynolds did not make those changes. I made the changes.

Q. Explain to me, if you will, the process that occurred. As I understand your testimony, you submitted to Reynolds Metals Company Exhibit 6, is that correct? [85] A. Yes.

Q. And then Reynolds Metals Company sent you a set of drawings? A. That's right.

Q. Which are Plaintiff's Exhibit 8, is that right? A. That's correct.

Q. And you have those before you?

A. I did. I don't have them now. I am aware of what they are.

Q. Now, is it your testimony that Plaintiff's Exhibit 6 and Plaintiff's Exhibit 8 are identical?

A. Yes, substantially so. There might be very, very minor differences in the way the dimension was held. But on the over-all part, whichever way the dimension was put, it would still conform to my median dimension.

These drawings, incidentally, if I may go a little further on that, are made for the diemakers. The diemakers evidently worked from these drawings, and they have to be put in a particular form. Otherwise there would be no need to make them. They could use my drawing in its original state. So what-

(Testimony of Abraham Grossman.)

ever nomenclature or method of dimensioning, any changes would be completely minor, and the over-all dimensions would hold true to match what I had given them originally.

Q. In other words, Mr. Grossman, the original drawing that you sent, Plaintiff's Exhibit No. 6, was the drawing [86] which was used by Reynolds Metals Company to make its dies and extrusions, is that right? A. That is correct.

Q. And Reynolds Metals Company did nothing to change it whatsoever? A. No, no.

Q. Thank you.

Now, you say that this Panador that is the subject of this litigation was a very novel door and had very novel features to it; and you explained about the weatherstripping and about that joint down on the left bottom side.

Do you know of any other doors that are identical to that Panador that are on the market today?

A. Only an entrance door that I made. That particular type of joint is used on that entrance door. And this was the first on the market, and it was called an Alumart entrance door. This is also in Sweet's catalog.

Q. Have you ever heard of the Sun Valley sliding door? A. Yes, I have.

Q. How does that differ from the Panador?

A. Considerably.

Q. It does?

A. We are suing them now because of patent infringement. And that's how I know of them.

(Testimony of Abraham Grossman.)

Q. You are suing them because of patent infringement? [87] A. Yes, we are.

Q. Is the Panador patented?

A. Their Panaview door is the exact copy of our Panaview door, and that is patented.

Mr. Mahoney: Your Honor, the witness is confused. He used "Panaview" twice in his answer. And so, to set the record straight, it might be explained that the Panaview Door & Window Co. makes a Panaview door and a Panador, and that it is the Panaview door which is patented and which is the subject of litigation.

Is that clear?

Mr. Duque: It's clear to me.

The Court: Do you accept Mr. Mahoney's statement as a Stipulation?

Mr. Duque: I accept his statement that the Panaview is a patented door. I did not know it before. I didn't know that any of these doors were patented.

Mr. Mahoney: Oh, the Glide door is also patented.

Mr. Duque: I thought he just finished saying that there was no patent involved.

Mr. Mahoney: He was referring to the Glide window, which was specifically what you were discussing.

Perhaps it might be better form to ask the witness what he was referring to.

The Court: What's the difference between a Panaview [88] door and a Panador?

(Testimony of Abraham Grossman.)

The Witness: The Panaview door is a door that is a little more difficult to manufacture, and the extruded shapes are more expensive because of their hollow shapes.

The Court: Is it for the same purpose?

The Witness: In that it's a door, it is the same purpose. But the shapes are much simpler in the Panador, and it is a much more competitive door because of that. There is less aluminum.

The Court: There is a design patent on that?

The Witness: No. We had a patent pending, but because of the patents on our other products we felt that they would cover on this.

The Court: I mean on the Panaview door.

The Witness: We have patents on those, yes.

The Court: On the Panaview door, but not on the Panador which is involved here?

The Witness: No. That is correct.

Q. (By Mr. Duque): Now, to go back to the novel and unique aspects of the Panadore, as I understand your testimony, you say that the Panador has two features that no other door has; one is the joint that you referred to, which makes it easy for anybody who is not a mechanic to put the door together; and the other is the feature with regard to the top runner? [89]

A. No, I didn't say it in that manner, or answer in that manner.

Q. Well, what did you say?

A. What I did was just to point out some of the features and some of the aspects of a door that

(Testimony of Abraham Grossman.)

could go toward making a good or a bad door if they weren't conceived of and carried out properly. I did not say that this was the only door employing weatherstripping of that kind.

As far as the joint is concerned, it is unique in this particular type of door.

Q. By "unique," you mean that no other company—

A. No other sliding door has ever used it.

Q. I see.

A. And that others might try to use some of these features—I have no doubt that they are trying to now. This, of course, is something that we are well aware of and are proceeding to defend our rights in that matter legally.

But as far as the aspects of a sliding door are concerned, many sliding doors have rollers; I would say they all do. There are slide doors that have weatherstripping; I would say most of them do. And that they are made of aluminum extrusions; they are that, also.

But what I was saying is that the chief feature of this door was that the simplicity of construction was to such a simple degree that it allowed us to manufacture this door far [90] under the price of even our Panaview door which, up until the time that this door came into being, was a very competitive door.

Q. What is so unique about the Panador? Would you mind stating again the unique features of the—

(Testimony of Abraham Grossman.)

A. Well, the unique feature of the door is that it is such a good door for the price.

Q. In other words, it is a good door and it's cheap? A. That is right.

Q. And that is the unique feature of it?

A. It certainly is.

The Court: And it is good because of the joint which you described?

The Witness: That is one of the features, the joint, and the fact that the weatherstripping that is put in it, as I tried to explain, is put in in such a way that even the aluminum tolerances on both sides, of the plus or minus, would not destroy the function of that weatherstripping. Whereas, if it were a bad door, or cheap, it would either rattle or be so tight as to be inoperable. Whereas this door works with the same ease as our Panaview door. It actually supplies the same benefits as the Panaview door which is at the higher price. And we have that comment from all over the country from builders who say that it does everything any other expensive door—— [91]

Mr. Duque: Now, Mr. Grossman, would you mind limiting your answers to the questions? The comments of the builders all over the nation, I don't think are quite relevant here.

The Witness: I was just trying to clarify the benefits of this door, as to why I feel that it is different than any other door——

Q. (By Mr. Duque): It has to do (a) with the

(Testimony of Abraham Grossman.)

weatherstripping and (b) with the joint, is that right? A. Those are some of the points, yes.

Q. Well, you said those were the two points. Now, are there other points?

A. Well, the ease of assembly in the field.

Q. Well, that is because of the joint, isn't it?

A. That's only one of the features of the joint.

But there are also a number of tolerances that have to be considered. A carpenter who isn't a good mechanic, or any man who isn't a good mechanic—it doesn't have to be a carpenter, necessarily; it could be just a homeowner that wants to put one of these doors in, and many times it is dependent on putting the sliding-door frame in perfectly, and that has to be done, ordinarily—at least up until this door was put in, or put out on the market—because any slight discrepancy in the way that frame was put in would be magnified in the way these large sliding panes of glass would sit on that track. If the door frame was off one-sixteenth of an [92] inch, the sash itself might be off a quarter to three-eighths of an inch in squareness because the mistake would be magnified. But the way this door is constructed, with such tremendous tolerances, it takes into account all of these variations that go with bad workmanship, and that was principally another feature in the success in the field.

Q. And that, you say, is not true of any other sliding door on the market? Is that your testimony?

A. To various degrees other doors have it. But

(Testimony of Abraham Grossman.)

this door is successful principally because it is to a tremendous degree.

Q. Mr. Grossman, is there anything from an engineering or technical point of view that is so unique and so different that it would prevent anybody from taking your Panador, breaking it down, and making an identical copy of it?

A. Yes, a great deal.

Q. What are the unique engineering features?

A. Well, aside from engineering features, but just the features themselves—I will call them just that—anybody can copy anything. And if, in the case of somebody wanting to copy a door, he presented a door or model of that door and had a die-maker make dies identical with the dies that this door showed the sections to be, the sections of the model that he is showing are already imperfect and may be imperfect to the utmost of tolerances. In other words, one part in the [93] door might be to the minus side completely of a tolerance; another part working with that might be completely to the plus side; so that the diemaker, not understanding the intricacies, copying those dies, would in turn have material from the dies he made go to opposite extremes, and, as a result, what we were talking about in the way of functioning with component parts within the extrusions would be so far off that a person would have to experiment for a year or maybe two to determine that he was wrong. It simply can't be copied from the actual item and be right.

(Testimony of Abraham Grossman.)

Q. So it is your contention that this door is so unique and so different and engineeringly so particular that it is impossible for anybody to copy this door and reproduce it within a period of less than two years?

A. I am not referring to this door. I am referring to any door that might be copied.

Q. Well, let's confine your testimony to the questions that I ask you. I am talking about the Panador. That is the one you are suing on, isn't it?

A. Yes. Referring to Panador, I can't qualify as to the time element. I only know that we worked on it for a number of years and went through all of the experimentation required to make it successful. And somebody, not knowing all of these fine points that we gained through our experience, would be bound to go through that same time element to make [94] it successful.

Q. Now, assuming that you went through all of these years of experimentation, and assuming for the purpose of the question that you developed certain unique features and so on and so forth, is it your testimony that this door is so different and so unique from an engineering point of view that it couldn't be copied within less than two years?

A. I didn't say it couldn't be copied—it could be copied within the time it takes to make extrusion dies, for that matter. But what I did contend was that the material run from those dies would, because of the various commercial tolerances allowable, not be as good a door or function properly as

(Testimony of Abraham Grossman.)

the dies made from my own drawings which gave the median lines, median dimensions for the tolerances to revolve about. That would be by hit or miss that that was finally discovered.

Q. Mr. Grossman, when did you first put Panador out on the market for sale to the public?

A. Sometime, I imagine, in the late summer or fall of 1954.

Q. And at that time did you exhibit it at exhibitions and at trade shows?

A. At the time we first sold it?

Q. When you first put it out on the market?

A. I don't recall. We might have, but I don't recall. [95]

Q. Now, when you say that you had a conversation with Mr. Kavich when you turned over to him Exhibit 6, as I understand your testimony, you told him that this was a new product and that you didn't want any of your competitors to know that it was coming out on the market and would he mind not telling any of the salesmen of any other companies. Is that correct?

A. Words to that effect.

Q. That was the substance of your conversation? A. Yes.

Q. You had no conversation with him about the use of dies or anything else? A. No.

Q. Now, with regard to Exhibit 8—do you have that in front of you, sir? A. Yes, I do.

Q. That is the one that has the word "Revised" written across it, is that right? A. Yes.

(Testimony of Abraham Grossman.)

Q. Is that right? A. Yes.

Q. You don't know who wrote that?

A. No. It evidently was someone in our company that wrote that for some unknown reason. But it has nothing to do with the drawing because the drawing is identical with the [96] original drawings that were received from Reynolds. So it couldn't have been received in that way.

Q. In other words, you don't know who wrote the word "Revised" on there?

A. I have no idea.

Q. You don't think it was anybody in your company?

A. I do think it was somebody in our company.

Q. You do? A. Yes, I do.

Q. Not the Reynolds Metals Company?

A. No.

Q. Then you think they wrote it in there by mistake or otherwise, because obviously it couldn't be revised because it is identical?

A. Yes, that is correct.

Q. When you first put out the Panador did you call it the "full light" door?

A. There was a number of doors, and I think one of the names was that.

Q. When you first put it out on the market were you manufacturing it for the W. P. Fuller Company? A. No.

Q. How did you happen to name it the "full light" door?

(Testimony of Abraham Grossman.)

A. I thought it would be a good name.

Q. It had nothing to do with the name "Fuller"? [97]

A. No, that is a coincidence. Later we felt it might be used for Fuller's own name if they so wanted it, but we never sold directly to Fuller.

Q. When you first dreamed up the name "full light," what connection did that have with the door? What did the "full light" mean?

A. "Full light" would mean a full light of glass, where you have a little frame and it allows as full a view as possible. And a full light, in terms of the glazing field, means that as little light is cut off as possible.

Q. Now, except for the conversations that you allegedly had with Mr. Sargeant in 1948 when you were president of Glide Windows, Inc., relating to the manufacture of windows, of extrusions for windows, and except for the conversation which you had with Mr. Kavich when you delivered Plaintiff's Exhibit 6 to him and asked him please not to tell your competitors you were coming out with this door—those are the only two conversations you had with any Reynolds Metals representative, were they not? A. As far as I can recall.

Mr. Duque: Will your Honor bear with me for a moment?

The Court: Yes.

Mr. Duque: No further questions at this time, your Honor.

The Court: Any redirect examination? [98]

Mr. Mahoney: No, your Honor.

The Court: You may step down.

(Witness excused.)

The Court: We will take a five-minute recess.

(Short recess.)

The Court: Call you next witness.

Mr. Mahoney: I now call Mr. Oldenkamp.

The Court: We will continue for only a few minutes.

Mr. Mahoney: This will be a very short witness, your Honor.

The Court: Very well.

CARL OLDENKAMP

called as a witness on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness. My name is Carl Oldenkamp, O-l-d-e-n-k-a-m-p.

The Clerk: C-a-r-l?

The Witness: Yes.

Direct Examination

By Mr. Mahoney:

Q. What is your residence, Mr. Oldenkamp?

A. 4425 Yosemite Way, Los Angeles 65.

Q. What is your occupation? [99]

A. I am president of Windsor Supply, Inc.

(Testimony of Carl Oldenkamp.)

Q. And as president of Windsor Supply, Inc., do you have custody of the business records of Windsor Supply Company, Inc.? A. I do.

Q. And have you brought certain of these records with you to court today?

A. Yes, I have.

Q. In response to a subpoena which was issued to you? A. Yes.

Q. What do these records consist of, Mr. Oldenkamp?

A. They are the purchase orders by Windsor to Reynolds Metals Company; invoices from Reynolds to Windsor Supply; and invoices by Windsor Supply to W. P. Fuller & Company, that have to do with the Windsor sliding door.

Q. I now show you a group of file folders which bear respectively on their tabs the designations "Reynolds Metals, RMC Sliding Door, RMC unpaid, RMC paid," and ask you if the files and the folders were drawn from the records of your company, which are kept in the ordinary and due course of business by your company.

A. That's right.

Mr. Mahoney: Will you kindly mark these as Plaintiff's Exhibit No. 9 for identification?

The Court: Isn't that a matter that can be covered by [100] stipulation, gentlemen?

Mr. Duque: I would think so, your Honor. I don't know what we are trying to prove, but I will be very happy to go over these—

Mr. Mahoney: We will be glad to do that, your

(Testimony of Carl Oldenkamp.)

Honor. These are the records of the purchases of Windsor from Reynolds, and the sales of Windsor to Fuller. And what we would like to do to avoid burdening the record and the court is to obtain a summary, which would constitute a stipulation, of the total purchases from Reynolds by Windsor and the total sales of Windsor to Fuller.

The Court: Could you arrange with Mr. Oldenkamp to make—

Mr. Mahoney: To make such a summary?

The Court: —some arrangement whereby you could have the schedules made up, or the summary, between now and Tuesday?

Mr. Mahoney: We plan to do that, your Honor. And we are asking that they be marked for identification so that we can retain possession thereof.

The Court: Very well. The files which you have identified in the record will be marked collectively as Exhibit 9 for identification.

Are there five of them?

Mr. Mahoney: Yes, your Honor. [101]

The Court: They will be marked 9-A, -B, -C, -D and -E.

Mr. Mahoney: There are four.

The Court: They will be 9-A, -B, -C and -D.

(The documents referred to were marked Plaintiff's Exhibits Nos. 9-A, 9-B, 9-C and 9-D for identification.)

Mr. Mahoney: And then can we include in that, for purposes of simplicity, the invoices of Windsor

(Testimony of Carl Oldenkamp.)

Supply Company to W. P. Fuller & Co., and just in that serial order, E, F, G, and so forth?

The Court: How many files are there?

Mr. Mahoney: Well, they are quite numerous, so what we could do is just mark them all E and then put them in the box. There are seven groups.

The Court: Seven groups. Those are invoices—

Mr. Mahoney: From Windsor to Fuller.

The Court: They will be marked 10-A, -B, -C, -D, -E and -F.

(Six groups of documents were marked Plaintiff's Exhibits Nos. 10-A, 10-B, 10-C, 10-D, 10-E and 10-F, respectively, for identification.)

The Court: Are there any further questions of Mr. Oldenkamp?

Mr. Duque: Your Honor, may I make this statement at this time? I do not know what the purpose of this testimony or this evidence is, and I reserve my right to object to it [102] on any grounds that I see fit when I find out what the purpose of it is and what the evidence is.

Mr. Mahoney: Well, we have already stated—

The Court: The problem now is whether you gentlemen can compile a summary of what that shows. I assume they want to show sales by Reynolds to Windsor, and then in turn sales by Windsor to Fuller.

Mr. Mahoney: That's correct.

(Testimony of Carl Oldenkamp.)

The Court: And irrespective of the admissibility of it, can you stipulate to a summary on it?

Mr. Duque: As far as I am concerned, if you can prevail upon Mr. Oldenkamp to prepare that summary, that is fine with me.

The Witness: I can do so.

Mr. Mahoney: Well, we would prefer, your Honor, to check that from these records. However, if Mr. Oldenkamp could prepare it, say, by Monday afternoon and bring the records down and we could check it with Mr. Duque—if Monday afternoon is a suitable time for so doing—then we could have it by Tuesday.

The Witness: I would rather have them prepare the summary because that places an additional burden on my staff. And I couldn't get it done by that time.

Mr. Mahoney: We will accept the burden.

The Court: Very well. Are there any further questions [103] of Mr. Oldenkamp?

Do you wish him to return here on Tuesday?

Mr. Mahoney: Did you wish to cross-examine him? We have no further direct examination.

Mr. Duque: I can't cross-examine him. I haven't anything—

The Court: Do you anticipate any cross-examination?

Mr. Duque: I would anticipate none, no, sir. I would assume that the summary that is going to be made correctly reflects the records, and all of the records.

(Testimony of Carl Oldenkamp.)

The Court: All you expect to show are sales by Reynolds to Windsor—well, that you already have.

Mr. Duque: That is fine.

The Court: —and, in turn, sales from Windsor to Fuller.

Mr. Mahoney: That is correct. That is what we expect to show.

Mr. Duque: I have no objection to the preparation of the summary. I reserve my right to object to the materiality when it is offered.

The Court: Yes. Well, the question now is to reach a stipulation as to the correctness, irrespective of admissibility.

Now, do these invoices show what was sold? Will you need Mr. Oldenkamp? [104]

Mr. Mahoney: No, your Honor. They show actually the quantity shipped, the quantity ordered, the size, the amount paid, the sum total.

I presume, Mr. Oldenkamp, that these invoices are all of the invoices in your possession relating to the transactions between Windsor Supply Company and Reynolds Metals Company, and between Windsor Supply Company and Fuller.

The Court: During the periods indicated.

The Witness: Well, this is all of them.

The Court: For any period?

The Witness: That's right.

The Court: Now, are these records comprising Exhibits 9 and 10 for identification kept under your supervision?

The Witness: Yes, sir.

(Testimony of Carl Oldenkamp.)

The Court: And you have already said they are kept in the ordinary course of the business of your company?

The Witness: That's right.

The Court: And it is the ordinary course of business of your company to keep such records as those comprised in Exhibits 9 and 10 for identification?

The Witness: That's right, your Honor.

The Court: Is there anything further of Mr. Oldenkamp?

Mr. Mahoney: Not from the plaintiff.

The Witness: May I ask a question, sir? There are certain files that have to do with the Reynolds Metals [105] Company that are used every day by me in the normal course of my business. Is it necessary that I leave those, as well?

The Court: I understand only the invoices—

Mr. Mahoney: That is what I have.

The Witness: Exhibit 9 is the one I am concerned with.

Mr. Mahoney: The Reynolds Metals Company; there are various orders and correspondence relating to orders, and the financial statements relating to them.

We will give them back to you on Tuesday. Would one day handicap you?

The Witness: That would be all right, then, if I can get them Tuesday.

Mr. Duque: Are you going to use the correspondence file?

(Testimony of Carl Oldenkamp.)

Mr. Mahoney: We haven't seen these. We have just subpoenaed this witness. We will go through it.

Mr. Duque: Well, if anybody is going to go through correspondence files, might I be included?

Mr. Mahoney: You are definitely included. We want you in the party.

The Court: Very well.

Mr. Oldenkamp, I think you better come back Tuesday morning at 10:00 o'clock, and we will attempt to make it very brief at that time. You are excused until then.

(Witness temporarily excused.)

The Court: The trial will be recessed until 10:00 [106] o'clock Tuesday morning.

And, Mr. Mahoney, if you will make known to the defendant anything of record that you want, I expect the defendant not to put you to the proof, because we haven't had a pretrial hearing in this matter, and see if you and Mr. Duque can't reach stipulations on it.

Mr. Duque: We have stipulated to some facts, your Honor, and I have all the records here. If Mr. Mahoney will tell us what he wants—

Mr. Mahoney: Well, we have already issued subpoenas to the various employees of the defendant.

The Court: There is no need of going through all that if Mr. Duque is willing to stipulate.

Mr. Mahoney: Well, he preferred that we subpoena them because—

The Court: Well, they are here now.

Mr. Duque: I preferred that you either subpoena them or you give me a list of them. I wanted to know what I was supposed to produce.

Mr. Mahoney: As long as they are here, this issue is through.

The Court: Very well. You gentlemen get together and stipulate. I don't see any real issue of fact here between you, any broad issues of fact here between you. There may be something on this issue of fiduciary relationship or some of [107] the oral conversations. But everything else is of record, isn't it?

Mr. Mahoney: A large percentage, your Honor.

The Court: Except some conversations, and that is all you can have any issue about, it seems to me. The rest of it, you had just as well stipulate to and save everyone's time.

Mr. Mahoney: Yes, your Honor. We will be happy to stipulate to anything we can.

The Court: Very well. The trial will be recessed until 10:00 o'clock Tuesday morning, November 22nd.

Court will adjourn.

(Whereupon, an adjournment was taken until Tuesday, November 22, 1955, at 10:00 a.m.) [108]

Tuesday, November 22, 1955—10:00 A.M.

The Clerk: Case No. 18469, Panaview Door & Window Co. v. Reynolds Metals Company.

Mr. Duque: Ready for the defendant.

Mr. Mahoney: Ready for the plaintiff.

The Court: You may proceed, gentlemen.

Mr. Mahoney: Yesterday, your Honor, in accordance with your Honor's requirements, there was brought to the Court an accountant who went over the invoices of Windsor Supply Company and who arrived at a figure which has been shown to counsel for the defendant. And the total figure on the document shown here is \$155,624.97. And this figure, counsel for the defendant will stipulate to as being approximately correct.

Is that correct, Mr. Duque? Is that a correct statement?

Mr. Duque: Yes, your Honor. I will stipulate to the figure being approximately correct, subject to checking by our accountant. But they inform me that it sounds as though it were approximately right.

The Court: Will you stipulate that it is correct, subject to check?

Mr. Duque: Yes, your Honor.

The Court: And it represents what?

Mr. Mahoney: It represents the sum total of the [111] Reynolds invoices as found in the files of Windsor Supply Company.

The Court: That means purchases by Windsor from Reynolds?

Mr. Mahoney: That is correct.

Mr. Duque: As I indicated on Friday, your Honor, I stipulate only to the correctness of the figures subject to further checking. I do not stipulate as to its admissibility.

The Court: Does your stipulation cover what the purchases are?

Mr. Duque: Sir?

The Court: Or, rather, what the purchases were?

Mr. Mahoney: Your Honor, we have some difficulty there because, going through the file of the Windsor Supply Company, we find it was their custom and practice to order this product in the form of doors, so many doors; and these orders of the Windsor Supply Company so read.

There are various documents in the record, including invoices from Reynolds which show that they broke up these doors into component parts and that these component parts, by agreement, would be shipped in boxes wherein one group of identical component parts was contained; but that when the invoice was presented, in many instances it was presented in terms of total number of doors in compliance with the order from Windsor so that there could be a matching of the order and invoice.

Mr. Duque: Well, your Honor, to counsel's statement I am [112] not in agreement, and I think the matter could be cleared up very promptly if Mr. Oldenkamp could take the stand for about three minutes and explain to the Court what the orders mean and what was received by Windsor from Reynolds.

The Court: Very well.

Then it is stipulated, as I understand it, that the purchases by Windsor from Reynolds aggregated a dollar value of \$155,624.97, subject to checking.

During what period was this?

Mr. Mahoney: This was in the entire period to date of the relationship of Windsor Supply Company—

The Court: From when, then?

Mr. Mahoney: That period extends—the negotiations started in September, and there were two oral orders—

Mr. Duque: In 1954.

Mr. Mahoney: September, 1954.

The Court: September, 1954, to date?

Mr. Mahoney: To date.

The Court: And open is the question of what was purchased, is that it?

Mr. Mahoney: Yes, your Honor.

The Court: But this much has been stipulated, as I understand it.

Mr. Duque: Yes, your Honor.

The Court: Very well. You may recall Mr. Oldenkamp. [113]

Mr. Mahoney: Mr. Oldenkamp, will you take the stand, please?

Mr. Duque: Your Honor, I wish to make it clear again that I don't know what counsel proposes to do with this figure, but I wish to make it clear again that I am not stipulating to its admissibility as evidence in this trial at this time.

The Court: I understand. You merely made the stipulation, but you object to the receipt of it in evidence?

Mr. Duque: Yes, your Honor.

CARL OLDENKAMP

recalled as a witness on behalf of the plaintiff, having been previously duly sworn, testified further as follows:

Mr. Mahoney: Will you please mark this for identification.

(The document referred to was marked Plaintiff's Exhibit No. 11 for identification.)

Direct Examination

By Mr. Mahoney:

Q. Mr. Oldenkamp, I now show you a purchase order of Windsor Manufacturing, Inc., which I have had marked as Plaintiff's Exhibit No. 11 for identification, and which bears the number 1691 and is directed to the Reynolds Metals Company and is ordered to be shipped to the Windsor Supply, [114] Inc. The order bears the date of March 25, 1955, and requests the delivery date of July, 1955.

Mr. Duque: That is the same one I saw yesterday?

Mr. Mahoney: Yes.

Q. In that order, Mr. Oldenkamp, there is reference made to 15,000 sets of sliding doors, KD sliding doors, is that correct?

A. Well, the order reads, "1,500 sets Windsor KD Sliding Door fabricated parts as follows:"—

Q. What does the term "KD" mean, Mr. Oldenkamp? A. Knocked-down.

(Testimony of Carl Oldenkamp.)

Q. And could you give a slight further explanation of "knocked-down" as it is used in the phrase when referring to sliding doors of the character under consideration here?

The Court: It means parts not assembled, doesn't it?

Q. (By Mr. Mahoney): Mr. Oldenkamp, when you made out a purchase order, was such purchase order made out under your supervision?

A. That's right.

Q. How did you determine the number of doors or sets of parts which it would be necessary for you to order?

A. From orders on hand; projected sales.

Q. And did you determine this from the numbers of orders for doors which were in your plant and which you considered would be necessary for shipment in the period for [115] which the order was to cover?

A. Not for orders on hand alone.

Q. Not for orders on hand alone? A. No.

Q. But for projected orders and potential sales which you considered you would make?

A. That's right.

Q. Now, when you made an order like this, did you contemplate receiving a complete shipment of all of the extruded parts necessary to the total number of sets which you ordered?

A. Well, those extruded parts from Reynolds, yes.

Q. And, in the prior practice, when you received

(Testimony of Carl Oldenkamp.)

these parts were they cut to size? A. Yes.

Q. And when you wanted to assemble a package for shipment to a customer, what was your practice? Would you take just one, two stiles, and one, two jambs, and the like, and just take them out of their respective boxes; and in some instances, perhaps, add rubber bumpers and, perhaps, weatherstripping, and move them into another box?

A. There was considerable work performed on those before we packaged them, yes.

Q. What was the considerable work performed?

A. Installation of weather seal; the tapping of end [116] rails; the installation of wheel carriers; the installation of wheels in the wheel carriers; the assembly of the bumpers; the attaching of the latch and the keeper; and in some instances installation holes that had to be drilled.

Q. Now, how much time and expense did these various installations take?

A. Well, it would have to be only a guess on my part at this time without going into considerable cost development. I don't have the cost figures here.

Q. Mr. Oldenkamp, is it not true that on many of the orders shipped to you by Reynolds Metals Company the frame sills had the dust stop riveted to the sill? A. Never.

Q. Did the frame heads ever have the dust stop riveted to the head? A. Never.

Q. Was there ever an installation of rubber bumpers attached to jambs with spacers?

A. Never.

(Testimony of Carl Oldenkamp.)

Q. Did they ever install in the bottom rails the corner inserts, the wheel carriers, and the like?

A. Never.

Q. Or did they ever attach the keeper to the right-hand interlocking stile? A. No. [117]

Mr. Mahoney: Will you please mark this for identification?

(The document referred to was marked Plaintiff's Exhibit No. 12 for identification.)

Q. (By Mr. Mahoney): I now show you Plaintiff's Exhibit No. 12 for identification, which is an order form bearing the number 1539, and having a paper label, "Windsor Supply, Inc.," pasted over the top portion thereof.

Now, on that order, Mr. Oldenkamp, how many sets of KD sliding doors were ordered?

A. "1,000 Windsor KD Sliding Door Fabricated Parts with the following subassemblies performed by Reynolds Metals Company: * * *"

Q. What subassemblies were to be performed by that order?

A. "Frame Sill: dust stop riveted to sill.

"Frame Heads: dust stop riveted to head.

"Frame Jambs: rubber bumpers attached to jambs with spacers, plates, screws and nuts.

"Bottom Rails: corner inserts, wheel carriers, wheels, axles, and pins to be inserted into the end.

"RH Interlocking Stile: keeper riveted to Stile.

"LH Interlocking Stile: latch attached to Stile with two screws."

(Testimony of Carl Oldenkamp.)

And then the other here, the finish and packing. [118]

Q. Now, was that order filled by the Reynolds Metals Company? A. Not in this instance.

Q. What happened to that order?

A. They didn't fill it in the manner that was asked for.

Q. How was it filled?

A. It was filled by cut extrusions.

Q. Can you then review briefly how the cut extrusions would come into the plant of the Windsor Supply Company?

A. Well, the changes to the purchase order dated April 5th gave the component parts of the required units, and there was another change dated April 21st. And it also states the component parts as far as the cut extrusions are concerned.

Q. But is it not true that where you ordered a certain number of sets of K1 parts for a certain number of doors, that you received all of the extrusions cut to size, with millwork and various punching operations performed thereupon—

A. That's right.

Q. —and these parts were shipped to you in boxes containing a number of identical parts? Is that correct?

A. That's right. Well, actually, for the record, they weren't in boxes. They were strapped together.

Q. They were strapped together. And then, when you wanted to make up a package for a sliding door, you would [119] merely take from the

(Testimony of Carl Oldenkamp.)

respective supplies of the parts the required number of extrusions, install the bumpers and install the weatherstripping and install the latch keeper and the latch, put it in another box and ship it out; is that correct?

A. Well, it's not quite as easy as it sounds, the way you make it now sound. It was necessary to secure all of this additional material and then assemble and install it in a carton and then label and ship.

Q. In other words, what you added to the extrusions were just the smaller components such as the rubber bumpers, the weatherstripping and the latches and things of that nature?

A. That's right.

Q. But the extrusions, as they came from the Reynolds plant, were substantially in the shape where, with these few additions, you could put them in a container and ship them to a customer. Is that correct? A. That's right.

Q. And when you put in an order for a thousand sets of parts for a sliding door, you expected to get enough extrusions substantially prepared for use to ship out a thousand containers containing parts for a thousand sliding doors, is that correct? A. That's right.

Mr. Mahoney: Now, your Honor, the plaintiff here [120] hesitates to burden the record with these numerous orders and invoices. The problem here which confronts the plaintiff is that we have these

(Testimony of Carl Oldenkamp.)

various invoices which specifically set forth the number of doors which are ordered, and we have also invoices of the Reynolds Metals Company totaling the number of doors which have been invoiced. And it has been our point here that the Windsor Supply Company ordered the doors in substantially the same manner they would have ordered them from the plaintiff, and that Reynolds Metals Company supplied the extrusions, cut and prepared to a large degree, to the Windsor Supply Company, and all the Windsor Supply Company was to do, in the language of the trade, was to add the findings to the extrusions, and the doors were ready to ship.

Now, the issue here—and the difference between counsel for plaintiff and counsel for the defendant lies in the fact that defendant refused to consider the possibility of a stipulation that doors were ordered by Windsor, and that in response thereto there appears on the invoices of the Reynolds Metals Company such statements as "1,000 doors, 14,021 pieces."

We think these invoices and orders clearly show doors or sets of door parts requested, sets of door parts delivered, and we would be willing to stipulate to that and to the total estimated number from the invoices without burdening the record with each invoice.

Mr. Duque: Your Honor, I have not refused to stipulate [121] to anything that is a fact. I refuse to stipulate to innuendoes and inferences which

(Testimony of Carl Oldenkamp.)

counsel attempts to put in the mouth of the witness and which he attempts to prove by these documents.

He says that because an invoice or order from Windsor Supply Company to Reynolds Metals Company calls for the components of 1500 doors, that that means that Reynolds Metals Company was supplying to Windsor Supply Company completed, packaged doors, and therefore we were in competition with Panaview by selling packaged, completed doors to its competitor, Windsor Supply. That is not the fact, your Honor.

If your Honor will look at these invoices which have been marked for identification, you will see that they call for the component parts of the doors. You have heard Mr. Oldenkamp's testimony that they never received any completed doors from the Reynolds Metals Company. They received in bulk milled component extruded parts for doors, which had been punched. They then went ahead, assembled the doors, packaged them, and sold them to the market.

So I can't stipulate that Reynolds Metals Company sold doors to Windsor because it is simply not the fact. They sold component extruded parts of the doors, which were assembled by Windsor and sold to the public, and packaged as a Windsor door.

Mr. Mahoney: Well, your Honor, I think the line of [122] questioning of the witness has been quite clear that we have attempted to bring out that there were a few additions to the major components of the doors shipped by Reynolds to Wind-

(Testimony of Carl Oldenkamp.)

sor; and we have not attempted in any way to twist the facts. When we say it says on a Reynolds invoice "1,000 doors," we are reading what is printed there.

The Court: But the order is for a thousand door parts, parts for a thousand doors.

Mr. Mahoney: Yes. But what our contention is, if your Honor please, is that these are the major component parts and the Windsor Supply Company merely added rubber bumpers, weatherstripping, and locks and latches, which constitute a very small part of the over-all cost of the door, and then shipped them out.

We are not trying to say that the Reynolds Metals Company actually packaged the complete door down to the bumper in any instance. We are just trying to say what is the truth and what is the fact here. And we certainly do not intend to deceive the Court by innuendo or by any other manner.

We will be happy to stipulate with counsel that orders for so many sets of component parts of sliding doors were transmitted by Windsor to Reynolds, and that orders for so many sets of component parts of sliding doors were shipped in turn and billed to Windsor by Reynolds; using exactly that language. [123]

Mr. Duque: Your Honor, I have no objection to Mr. Oldenkamp testifying to, or to stipulating to whatever figure he gives us as to the number of extruded, milled aluminum shapes Reynolds Metals Company sold to Windsor Supply Company. What-

(Testimony of Carl Oldenkamp.)

ever their books and records show, which we can verify with ours, I am perfectly willing to stipulate to.

The only thing, your Honor—I hope I make myself clear—I can't stipulate that Reynolds Metals sold doors to Windsor because that is not the fact.

The Court: How many of these knocked-down door parts did you buy from Reynolds Metals Company?

The Witness: There was a tabulation made yesterday, and I didn't see the total. All I saw was the scratch sheet that showed the number of doors that were involved.

Mr. Mahoney: The total—and this is an approximate total—number of sets of doors which were ordered was 5,712. And there were shipped 4,929.

And there is an indication that there was also shipped an additional 364, which would bring the total well over 5,000.

The Court: Well, are you willing to stipulate that Windsor purchased from Reynolds the parts which when assembled would approximate 5,000 completed doors?

Mr. Duque: I can't stipulate to that, your Honor. I can stipulate that Reynolds shipped to Windsor milled [124] extruded shapes in bulk which, when put together with other component parts which were purchased from other people and which they packaged, made up approximately 5,000 doors.

(Testimony of Carl Oldenkamp.)

The Court: Well, perhaps Mr. Oldenkamp can—

What parts of the doors did you not purchase from Reynolds? Can you tell us that?

The Witness: Cartons, glazing vinyl, weather-seal, bumpers, spacers, screws, latches, keepers. There were various other sundry supplies that don't come to my mind at this time.

The Court: Can someone tell us, so we can have a stipulation on it? The witness apparently can't name all the things that were not purchased from Reynolds.

Mr. Mahoney: Well, Mr. Grossman would probably be qualified to—

The Witness: Well, you could add the carton ends and the staples and the sealing tape.

The Court: I am talking about what goes into the door, not what goes into the package.

Can you say, "We purchased all the component parts to make a completed door from Reynolds, except as follows"—

The Witness: All right. Dust stop for the head. Dust stop for the sill. The metal-back weather seal to the top rails. The vinyl-back weather seal for the bottom rails and the jambs. And then wheels, axles, corner screws, installation [125] screws, safety bumpers, safety bumper spacer, back-up plates, the screw for the safety bumper, the nut for the safety bumper, the jamb bumper, the jamb bumper screw, the adhesive for the dust stops.

Did I include in there the glazing vinyl?

(Testimony of Carl Oldenkamp.)

The Court: As I recall, you did. If you didn't, it is included, is it?

The Witness: Yes. The latch and the latch keeper; the latch screws and the keeper screw.

I think that covers it.

The Court: Now, except for the parts that Mr. Oldenkamp mentioned in this last answer, is it stipulated that from September, 1954, to date the Windsor Company has purchased from the Reynolds Company, and the Reynolds Company has supplied the Windsor Company with component parts for approximately 5,000 doors?

Mr. Mahoney: Yes, your Honor.

The Court: So stipulated by the defendant?

Mr. Duque: So stipulated, your Honor.

The Court: Very well.

Mr. Duque: I still have an opportunity to cross-examine the witness on the operations, do I not? I mean, by stipulating to that, I—

The Court: Yes. I assume we are only obviating the necessity of going through each one of these orders and [126] invoices.

Mr. Duque: Thank you.

Would you bear with us, your Honor, for a moment?

The Court: Yes.

Q. (By Mr. Mahoney): Mr. Oldenkamp, did you ever receive any incomplete shipments of component parts of sliding doors from Reynolds?

A. Yes.

(Testimony of Carl Oldenkamp.)

Q. Now, if you received such an incomplete shipment, was it possible to ship out the total number of doors which you contemplated, or did you have to wait until you got the remainder of the shipment?

Mr. Duque: To which question I object, your Honor. It is incomplete, irrelevant, and has no materiality that I can see with regard to this lawsuit.

Mr. Mahoney: Your Honor, here we are trying to show that the essence and essentials of the sliding doors lay in what Reynolds Metals supplied.

The Court: Well, I'd assume from what's been testified that a part of something won't make all of it, and that, therefore, until all of it is there, the completed product isn't there.

Mr. Mahoney: Well, then, your Honor will take it as a matter of judicial notice that Reynolds Metals Company was supplying essential components of the sliding door, which [127] lacking, the door could not be placed in a carton and shipped to a customer.

The Court: That would be correct, would it not, Mr. Oldenkamp?

The Witness: That's right.

The Court: The witness so states.

Q. (By Mr. Mahoney): Now, Mr. Oldenkamp, can you tell us what the relationship between Windsor Manufacturing and Windsor Supply Company was and is?

A. They are two separate corporations.

Q. Now, I notice that the orders here began

(Testimony of Carl Oldenkamp.)

with "Windsor Manufacturing Company," and then there were little labels pasted on the orders, bearing the title "Windsor Supply, Inc."

A. That's right.

Q. Now, can you explain that relationship or that changeover?

A. Well, the controlling interest in both corporations is owned by one individual.

Q. Who is that individual?

A. C. A. McLin.

Q. And in your relationship as Windsor Supply, Inc., with Reynolds you merely continued in the footsteps of Windsor Manufacturing Company, is that correct? A. No. [128]

Q. What did you do?

A. The basis for operation, to my knowledge, Windsor Manufacturing was strictly a sales organization. They never made anything. Windsor Supply is in the assembly or manufacturing operations. And when the sales organization ceased operations, because of the similarity in the names and in the forms that Windsor Manufacturing copied from Windsor Supply, we continued to use their forms by the use of labels.

Q. And did Windsor Supply sell to customers which were previously handled by Windsor Manufacturing?

A. Well, you can reverse that. Windsor Supply was in existence long before Windsor Manufacturing, and when Windsor Manufacturing was set up as a sales organization they took Windsor Sup-

(Testimony of Carl Oldenkamp.)

ply customers. And then, when they ceased operations, the Windsor Supply Company continued selling those customers.

Q. There was a direct change between the companies, the two companies, is that correct?

A. There was an agreement between the two companies.

Q. And were both corporations wholly owned by Mr. McLin? A. Not wholly owned.

Q. But he was the dominating owner—

A. Influence.

Q. ——of both corporations? [129]

A. That's right.

Mr. Mahoney: Will you please mark this for identification as Plaintiff's Exhibit No. 13?

(The document referred to was marked Plaintiff's Exhibit No. 13 for identification.)

Q. (By Mr. Mahoney): Mr. Oldenkamp, I show you a letter, Plaintiff's Exhibit No. 13 for identification, addressed to the Reynolds Metals Company on September 29, 1954, to the attention of Mr. Harry Sargent, by M. C. Plumley, president.

Mr. Duque: May I see it, please?

Mr. Mahoney: Yes. I am sorry.

Q. I direct your attention to the bill of "Materials-Specifications-Anticipated Requirements" appended to that letter as a part thereof; and I particularly direct your attention to the heading, "Windsor Supply, Inc.," and ask you if there is an indication under that heading that a sliding door

(Testimony of Carl Oldenkamp.)

had been supplied to Reynolds Metals Company by Windsor Supply, Inc.

A. Well, in order to clarify the situation, I was not an officer of the organization at that time, and the arrangements entered into between Windsor Supply and Reynolds Metals—all I can determine is from the record. This states that Windsor Supply and Duratile of the West had certain aluminum requirements, and they were at that time attempting to negotiate those requirements. And in those requirements Windsor [130] Supply had:

“A. De Luxe Sliding Door materials:

“A sample door has been delivered to you in order that you may ascertain extrusion and fabrication requirements.

“Anticipated monthly requirements: 1,000 units 6'10"x6'10".

“B. Standard Sliding Door materials:

“2,500 units 6'10"x6'10".

“C. Sliding Window materials:

“A sample window has been delivered to you in order that you may ascertain extrusion and fabrication requirements.

“Anticipated monthly unit requirements: 2,000 units 3'0"x3'0".

“Quotations Requested—Windsor Supply, Inc., A, B, & C, above:

“(a) Raw materials.

“(b) Fabricated doors and windows”—

And then it goes on to other manufactured items like shower doors, tub enclosures, and so on.

(Testimony of Carl Oldenkamp.)

Mr. Mahoney: I now offer Plaintiff's Exhibits Nos. 11, 12, and 13 for identification in evidence.

Mr. Duque: To which I object, your Honor, on the grounds that they are incompetent, irrelevant, and immaterial, tend [131] to prove no issues in this case. They are self-serving and hearsay insofar as this defendant is concerned.

The Court: What is the purpose of the offer?

Mr. Mahoney: The purpose of the offer, your Honor—

The Court: I take it the offer also includes the stipulations made as to the dealings between Windsor and Reynolds.

Mr. Mahoney: That is correct, your Honor.

The purpose of the offer here is to show that, in breach of its covenant, implied covenant of good faith, as part of the agreement which constituted a part of the acknowledgment relating to the order for the dies, and in direct sales competition with the plaintiff here, Reynolds Metals Company, for its own profit and in complete disregard of its position of trust and confidence—

The Court: I didn't ask for argument. I just asked for a mere statement of purpose. What issue in the case is this relevant to?

Mr. Mahoney: It relates to the contract issue to the breach-of-confidential-relationship issue and to the unfair-competition issue.

It relates to the contract issue by the breach of the implied covenant of good faith.

(Testimony of Carl Oldenkamp.)

It relates to the breach-of-confidential-relation-ship issue because, by the use of the very product of what was given to the defendant, they were enabled to perform this act. [132]

And it relates to the unfair-Competition issue because they actually entered into the sale of these component parts of sliding doors in direct competition with the plaintiff.

The Court: The objection will be overruled. The documents and the stipulation will be received in evidence for the purpose of showing the dealings between Reynolds and Windsor.

(The documents referred to, marked Plaintiff's Exhibits Nos. 11, 12, and 13, were received in evidence.)

PLAINTIFF'S EXHIBIT No. 11

Purchase Order

Windsor Manufacturing, Inc.

906 East Green Street

RYan 1-6964 SYcamore 5-3256

Pasadena 1, California

No. 1691

To: Reynolds Metals Company, 601 South Ardmore,
Los Angeles, California.

Ship to: Windsor Supply, Inc., 4532 San Fernando
Rd., Glendale 4, California.

(Testimony of Carl Oldenkamp.)

Req. No.

F.O.B. Shipping Point Std.

Acct. or Job No.: Sliding Doors.

Ship Via: Truck.

Terms: Net 30 days.

Date: March 25, 1955.

Delivery Date Required: July, 1955.

Quantity	Description
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1,500 Sets	Windsor KD Sliding Door fabricated parts as follows:
------------	--

1	F2()-1 Frame Head.
---	--------------------

1	F2()-2 Frame Sill.
---	--------------------

2	F26-3 Frame Jambs.
---	--------------------

2	F26-5 Strike Stile.
---	---------------------

1	F26-6 Keeper Stile.
---	---------------------

1	F26-7 Latch Stile.
---	--------------------

2	F2()-8 Bottom Rail.
---	---------------------

2	F2()-9 Top Rail.
---	------------------

4	F26-10 Wheel Carrier.
---	-----------------------

As Required F26-12 Meeting Stile.

Specific quantities of each of the above component parts will be furnished by July 1, 1955.

Conditions: Prices set forth include all charges for Seller's packing and crating supplied for protection in shipment and storage. All materials or articles ordered will be subject to final inspection and approval at destination.

(Testimony of Carl Oldenkamp.)

Notification: If any of the terms or conditions indicated, including delivery requirements, cannot be met for any reason, please notify us immediately.

Identification: Show our purchase order number on all packages, packing lists, invoices, bills of lading, and other documents.

Packing Lists: Send packing list with each shipment, listing the contents of each package in detail.

Invoice in 2 copies. Resale: Yes.

Resale Permit No.: AG39141. Confirming:....

WINDSOR SUPPLY, INC.,

/s/ C. OLDENKAMP,

Authorized Signature.

Received in evidence November 22, 1955.

PLAINTIFF'S EXHIBIT No. 12

Purchase Order

Windsor Supply, Inc.
4424 San Fernando Road
Glendale 4, California
Telephone CHapman 5-1013

No. 1539

(Testimony of Carl Oldenkamp.)

To: Reynolds Metals Company, 601 South Ardmore,
Los Angeles 5, California.

Ship to: Windsor Supply, Inc., 4532 San Fernando
Road, Glendale 4, California.

Req. No.:

F.O.B.: Shipping Point Standard.

Acct. or Job No.: Sliding Doors.

Ship Via: Truck.

Terms: Net 30 days.

Date: February 1, 1955.

Delivery Date Required: April 25, 1955.

Quantity	Description
Item No. 1	1000 Windsor KD Sliding Door Fabricated Parts with the following sub-assemblies performed by Reynolds Metals Company:
Frame Sill:	dust stop riveted to sill.
Frame Heads:	dust stop riveted to head.
Frame Jambs:	rubber bumpers attached to jambs with spacers, plates, screws and nuts.
Bottom Rails:	corner inserts, wheel carriers, wheels, axles, and pins to be inserted into the end.
RH Interlocking Stile:	keeper riveted to Stile.
LH Interlocking Stile:	latch attached to Stile with two screws.

(Testimony of Carl Oldenkamp.)

Finish: Standard mill finish for extruded shapes.

Packing: Bulk packed.

(Specific sizes for the above units will be furnished in writing or by telephone by April 1, 1955.)

Conditions: Prices set forth include all charges for Seller's packing and crating supplied for protection in shipment and storage. All materials or articles ordered will be subject to final inspection and approval at destination.

Notification: If any of the terms or conditions indicated, including delivery requirements, cannot be met for any reason, please notify us immediately.

Identification: Show our purchase order number on all packages, packing lists, invoices, bills of lading, and other documents.

Packing Lists: Send packing list with each shipment, listing the contents of each package in detail.

Invoice in 2 copies. Resale: Yes.

Resale Permit No: Confirming:.....

/s/ C. OLDENKAMP,
Authorized Signature.

Received in evidence November 22, 1955.

(Testimony of Carl Oldenkamp.)

PLAINTIFF'S EXHIBIT No. 13

September 29, 1954.

Reynolds Metals Company,
601 South Ardmore,
Los Angeles, California.

Attention: Mr. Harry Sargent.

Gentlemen:

It has been proposed that Windsor Supply, Inc., and Duratile of the West, two California corporations enjoying common ownership, investigate the possibility of entering a contractual agreement with Reynolds Metals Company to the end that these two organizations purchase from Reynolds Metals Company at least 75% of the materials required by them and specified under such agreement.

It is the purpose of this presentation to inform you of the materials needed, specifications therefor, and anticipated monthly requirements of Windsor Supply, Inc., and Duratile of the West in order that you may quote to us your prices on such materials both in raw form and at various stages of processing. Such a listing is enclosed herewith.

It is our understanding that entry into such a contractual relationship would afford our organizations, in addition to favorable price quotations, a certain priority insofar as deliveries upon our orders are concerned. It is requested that these priority ad-

(Testimony of Carl Oldenkamp.)

Plaintiff's Exhibit No. 13—(Continued):
vantages be the subject of your comment at the time that quotations herein requested are transmitted by you to us. Also desired is information concerning the method of meeting die costs and freight charges under such a contractual arrangement.

Of special concern to us is the early production of sliding doors and windows and for this reason it is requested that you indicate the earliest possible date at which delivery can be made on extrusions and fabricated units of this type.

I will anticipate your early response to the requests herein contained with the hope that a mutually agreeable contractual relationship may be entered by our respective organizations.

Yours very truly,

M. C. PLUMLEY,
President.

MCP:ep

Enc.

Materials—Specifications—
Anticipated Requirements

Duratile of the West:

A. Aluminum Coil Stock:

Specifications: .019 3-SH-14 Alodized.

Anticipated monthly requirements:

45,000 lbs. 5 $\frac{1}{4}$ " wide.

15,000 lbs. 10 $\frac{1}{4}$ " wide.

(Testimony of Carl Oldenkamp.)

Plaintiff's Exhibit No. 13—(Continued):

Quotations Requested:

- (a) Raw material.
- (b) Raw material blanked.
 - (1) Sizes required: 5x5, $\frac{5}{8}$ x5, $2\frac{1}{2}$ x5, 5x10, $2\frac{1}{2}$ x10.
- (c) Finished tile—Synthetic Acid Resisting Baked Enamel Finish.

Windsor Supply, Inc.:

A. Deluxe Sliding Door materials:

A sample door has been delivered to you in order that you may ascertain extrusion and fabrication requirements.

Anticipated monthly requirements:

1000 units 6'0"x6'10".

B. Standard Sliding Door materials:

2500 units 6'0"x6'10".

C. Sliding Window materials:

A sample window has been delivered to you in order that you may ascertain extrusion and fabrication requirements.

Anticipated monthly unit requirements:

2000 units 3'0"x3'0".

Quotations Requested—Windsor Supply, Inc.,

A, B, & C, above:

- (a) Raw materials.
- (b) Fabricated doors and windows:

(Testimony of Carl Oldenkamp.)

Plaintiff's Exhibit No. 13—(Continued) :

D. Shower Doors:

1. Number 100 Design #1.

A sample door has been delivered to you in order that you may ascertain extrusion and fabrication requirements.

Attached hereto as Exhibit A are die drawings of required extrusions.

Anticipated monthly unit requirements: 2,500.

E. Shower Enclosures:

1. Number 1150.

A sample enclosure has been delivered to you in order that you may ascertain extrusion and fabrication requirements.

Attached hereto as Exhibit B are die drawings of required extrusions.

Anticipated monthly unit requirements: 1,000.

2. Number 501.

A sample enclosure has been delivered to you in order that you may ascertain extrusion and fabrication requirements.

Attached hereto as Exhibit C are die drawings of required extrusions.

Anticipated monthly unit requirements: 2,500.

(Testimony of Carl Oldenkamp.)

Plaintiff's Exhibit No. 13—(Continued):

Quotations Requested—Windsor Supply,
Inc., A, B, C, D & E, above:

(a) Raw materials as follows:

Extrusion Number	Quantity
10757	20,000 lbs.
10756	4,000 "
19981	2,000 "
15310	4,000 "
15311	2,500 "
28526	7,500 "
28530	4,000 "
24239	2,000 "
28531	1,000 "
28002	500 "
5011	6,500 "
5012	16,000 "
5008	7,500 "
5010	5,000 "
5006	16,000 "
5005	500 "
5007	750 "
Deluxe Sliding Door (approx.)	50,000
Standard Sliding Door (approx.)	76,000
Sliding Window (approx.)	40,000

(b) Fabricated Doors and Shower Enclosures.

(Testimony of Carl Oldenkamp.)

Plaintiff's Exhibit No. 13—(Continued) :

F. Aluminum Angle:

Specifications: 1 $\frac{1}{4}$ "x1 $\frac{1}{4}$ "x3/16" Structural Angle 61 S-T6.

Anticipated monthly unit requirements: 2,000 pounds.

G. Aluminum Coil Stock:

Specifications: .040 35 $\frac{1}{2}$ H.

Anticipated monthly requirements: 2,000 lbs. 1 1/16" wide.

Quotations Requested—Windsor Supply, Inc., F&G, above.

(a) Raw materials.

Received in evidence November 22, 1955.

Mr. Mahoney: Will you please mark this for identification as Plaintiff's Exhibit No. 14?

(The document referred to was marked Plaintiff's Exhibit No. 14 for identification.)

PLAINTIFF'S EXHIBIT No. 14

Memorandum

To: R. C. Gunderson,

From: M. C. Plumley,

Date: November 26, 1954.

Subject: Information Obtained Phoenix Trip—
(Reynolds Metals.)

(Testimony of Carl Oldenkamp.)

Plaintiff's Exhibit No. 14—(Continued):

The following is a recitation of certain points covered and information received on the trip made by you and me to Phoenix on November 23. There has been no attempt to organize the information in proper sequence and, as stated to you, I have merely attempted to list the various points.

Mr. Montgomery first stated that he felt a solution had been reached in engineering of the sliding windows whereby it would be possible, with not more than a 1/16" overlap at the stile, to provide within the various units window frames and glass of exactly equal sizes.

In regard to the sliding door and Reynolds' pricing thereof, the price quoted included all of the materials and labor costs on such doors, with the exception of certain parts which necessitated outside purchase. The labor necessary on these outside purchased parts was included in the quotation, with the exception of labor of weatherstripping which was not to be applied by Reynolds. The outside purchases include:

1. Latch and keeper.
2. Rubber bumpers (both small and large assemblies).
3. The rollers.
4. Dust stops.
5. Weatherstripping.

(Testimony of Carl Oldenkamp.)

Plaintiff's Exhibit No. 14—(Continued):

Mr. Gunderson explained to Mr. Montgomery the need for the SP sliding door, which is framed in wood and eliminates the need for jambs and header. A price was promulgated during the afternoon on this door and a quotation on an 8'x6'10" SP door of \$21.70 was provided us.

Mr. Fontana, of the pricing department, requested some information concerning the sliding doors and windows, and it was estimated by Mr. Gunderson that a minimum of 15,000 doors would be purchased from Reynolds in the twelve months subsequent to the filing of our first order for release of doors. The tooling for these doors (\$3,600), as well as the extrusion dies (\$1,240), is to be amortized over the first 1,500 doors released. This would indicate a total amortization of \$4,840, or approximately \$3.23 per door on the first 1,500 doors.

The quotations include freight to Glendale on the basis of 30,000 pound shipments. Any shipment under 30,000 pounds will bear, of course, an LTL rating and the differential must be borne by Windsor Supply, Inc. Since the carload (30,000 pound) rate is \$1.39 per cwt. and the LTL rate is \$2.21 per cwt., the differential to be borne by Windsor Supply, Inc., would be \$.82 per cwt., or roughly \$.27 per door.

Doors will be packed according to part and the boxes stenciled with the part and the number of

(Testimony of Carl Oldenkamp.)

Plaintiff's Exhibit No. 14—(Continued):

units contained therein. Our original order will be in the form of a blanket order for the amount contracted for over the first twelve month period, and each order thereafter will be considered a release against that original blanket order, such release orders to be for completed doors desired.

To more completely describe the mechanics of the ordering process mentioned above, it was explained that the information given Reynolds on Tuesday, as to the volume anticipated, will be made part of a written proposal which will be received by me from the Reynolds Metals Company. Immediately thereafter, Mr. Harry Sargent will provide us with a purchase contract, requesting our signature thereon and covering the volume to be contracted for per year from the first release. Thereafter, as stated above, our orders will be considered "release orders" against this purchase contract.

In regard to sliding windows, Mr. Gunderson estimated the same 15,000 unit annual requirement, and it was decided that releases should be on the basis of 2,000 units per release, in order to provide production efficiency to Mr. Montgomery, and in the amount of 3,000 units per release if possible, in order to eliminate the LTL freight differential which would be necessary on shipments of less than 3,000 units.

The problem involved in attempting to anticipate sizes for windows was discussed, and Mr. Mont-

(Testimony of Carl Oldenkamp.)

Plaintiff's Exhibit No. 14—(Continued) :

gomery promised that this problem would be considered by Reynolds in release orders on windows. He indicated that he was sure we would have to call for small numbers of various sizes from time to time and that Reynolds would work with us. Of course, this will entail Windsor Supply, Inc.'s picking up the freight differential on such small releases, and we should in every instance attempt to order small numbers of unexpected sizes in conjunction with the balance of another full 2,000 or 3,000 unit release order. A further problem involved in these unexpected orders for various sized windows was presented by Mr. Montgomery. He requests that, should Windsor Supply, Inc., receive an order less proper specifications, we should, despite the fact that we could do little more than warn Reynolds, notify them of the order and the approximate time that we will desire delivery. Thereafter, of course, we should furnish these specifications at the earliest possible date, but this forewarning will assist Mr. Montgomery.

The tooling on the windows is the only item to be amortized, since we are making the dies at Pacific Machine Tool Corp. The tooling for fabrication will amount to approximately \$3,875, and it is suggested that this tooling expense be amortized over the first 4,000 units, which would amount to roughly \$.96 per unit on the first 4,000 released.

(Testimony of Carl Oldenkamp.)

Plaintiff's Exhibit No. 14—(Continued):

It was further decided that Windsor should give PMTC a purchase order on the dies which are to be made for windows, rather than go through the billing and rebilling process of having Reynolds order from PMTC and then bill Windsor for these dies.

In response to our request for information concerning the price at which dies should be made by PMTC for Reynolds, Mr. Montgomery stated that he would furnish the writer with Reynolds' formula for pricing of dies. Upon receipt of this formula, we will have an indication as to whether the price received will provide a profitable die making operation for PMTC.

The shower doors and enclosures became the subject of comment and a detailed description of the samples, as well as the die prints formerly furnished Mr. Montgomery was entered into. Mr. Montgomery will need details on cutting length on the #1150 and #501 enclosure and on the #100 and #600 door, along with a resume of mitering needs and any further detail pertaining to these items. We stated that the hinge can be furnished by Windsor Supply, Inc., and that we can further supply the dies for the handle [or handles themselves.*]

*[Matter within brackets appeared in longhand as an alteration on the original copy.]

(Testimony of Carl Oldenkamp.)

Plaintiff's Exhibit No. 14—(Continued) :

Mr. Montgomery explained that it was impossible for him to accept the purchase order for the raw materials, but that this should be started in Los Angeles with Harry Sargent. By the time that shipment of these raw materials by Reynolds is possible, Mr. Montgomery will have provided us with prices on fabrication of the above items. Upon receipt of these prices, the decision will be made as to whether the fabrication will be by Montgomery or Windsor Supply, Inc., and routing of the extrusions will be made accordingly. Mr. Montgomery further suggests that the order presently to be placed be followed immediately by an order covering our future requirements and, of course, delivery on both orders can be switched to Mr. Montgomery if he is to fabricate.

The orders for the dies which were explained in detail to Mr. Montgomery should also be placed with Mr. Sargent, along with the order for extrusions.

It will not be possible to obtain the quotations on fabrication for approximately four weeks, which will be roughly the delivery date on raw extrusions. Prices on dies and raw extrusions can be obtained from Harry Sargent upon placement of the order.

M. C. PLUMLEY.

MCP:ss

cc: C. A. McLIN

Q. A. EWERT

(Testimony of Carl Oldenkamp.)

Plaintiff's Exhibit No. 14—(Continued):

Reynolds Metals Company

Quotations—Sliding Doors

November, 1954

F2

6'x6'10"	.....	\$27.80
7'10 ¹ / ₄ "x6'10"	.....	30.41
8'x6'10"	.....	30.48
10'x6'10"	.....	33.80

F3

9'x6'10"	.....	\$39.29
11'10"x6'10"	.....	43.24
12'x6'10"	.....	43.46
15'x6'10"	.....	48.40

F4

12'x6'10"	.....	\$50.61
15'7 ⁷ / ₈ "x6'10"	.....	55.94
16'x6'10"	.....	56.07
20'x6'10"	.....	63.31

Identified November 22, 1955.

(Testimony of Carl Oldenkamp.)

Q. (By Mr. Mahoney): I now show you a memorandum to Mr. Gunderson from **Mr. Plumley**, dated November 26, 1954, and bearing Plaintiff's Exhibit No. 14 for identification, and ask you if in paragraph 3 and the remaining paragraphs on page 1 of that memorandum the practice set forth is substantially that which was followed in your dealings with Reynolds Metals Company?

Mr. Duque: Now, if the Court please, this is a memorandum, as I understand it, from **Mr. Gunderson**—

Mr. Mahoney: To **Mr. Plumley**.

Mr. Duque: **Mr. Gunderson**, as I understand it, your Honor, was the president of the Windsor Manufacturing Company. [133] **Mr. Plumley** was president of the Windsor Supply Company. They are taking a document—

The Court: State your objection.

Mr. Duque: I object to the question on the grounds that it is hearsay as to this defendant, and any testimony from this document as between **Mr. Plumley** and **Mr. Gunderson** is obviously hearsay. It is between the president of one corporation to the president of another corporation, and the defendant has no part in the memorandum or in the question.

Mr. Mahoney: The memorandum is introduced as a part of the records of Windsor Supply.

The Court: It isn't in evidence here. You are asking this witness—

Mr. Mahoney: We are asking a question relating to something set forth in this memorandum.

(Testimony of Carl Oldenkamp.)

The Court: You are asking this witness to read a document, to place his interpretation upon it and give his conclusion as to whether that conforms to a state—

Mr. Mahoney: Which he is cognizant of.

The Court: Which he may or may not be. It hasn't been shown yet whether it is or not.

Sustained.

Mr. Mahoney: Will you please mark this for identification as Plaintiff's Exhibit No. 15?

(The document referred to was marked Plaintiff's Exhibit No. 15 for identification.) [134]

Q. (By Mr. Mahoney): I now show you a proposal bearing the heading, "Parts Division, Reynolds Metals Company," marked Plaintiff's Exhibit No. 15 for identification, and ask you if you are familiar with the contents of that proposal?

A. Yes, I am.

Q. And on the back of the proposal do you find a printed statement, "Terms and Conditions"?

A. None as directly stated in that. Which one did you have?

Q. Do you find the term, "Quotation conditions," and under the term "Quotation conditions" a paragraph numbered 10, "Tools and Equipment"? A. That's right.

Q. Now, did you have any personal dealings with Reynolds Metals Company in regard to dies which were fabricated by the parts division for the

(Testimony of Carl Oldenkamp.)

account of Windsor Supply, Inc.? A. No.

Mr. Mahoney: I now introduce Plaintiff's Exhibit No. 15 into evidence.

Mr. Duque: To which I object, your Honor, on the grounds that it is incompetent, irrelevant, and immaterial; it has no bearing on the issues in this case. It is a document which purports to be a proposal from the defendant, Windsor Supply Company, which is not a party to this action, the [135] terms of which document are entirely different and entirely contrary to any document upon which plaintiff relies in this case.

I object to it upon those grounds.

The Court: May I see Exhibit 15 for identification, Mr. Clerk?

(Whereupon, the document was handed to the court.)

The Court: Was this proposal accepted?

The Witness: Not in its entirety.

The Court: The objection is overruled. Exhibit No. 15 may be received in evidence.

(The document referred to, marked Plaintiff's Exhibit No. 15, was received in evidence.)

Mr. Mahoney: Your witness, Mr. Duque.

(Testimony of Carl Oldenkamp.)

Cross-Examination

By Mr. Duque:

Q. Mr. Oldenkamp, do you have personal knowledge of the shipments which were received by Windsor Supply from Reynolds Metals Company?

A. Yes.

Q. Will you tell us what those shipments were, during the entire period of time in which Windsor Supply was doing business with Reynolds Metals Company, what those shipments consisted of? [136]

A. Well, each shipment? That would be pretty—I can give you general knowledge.

Q. Yes.

A. The first shipment consisted of extrusions without any fabrications by Reynolds.

The second shipment did consist of fabricated parts. They were received by Windsor Supply in bundles strapped together of like kind. There were a number of shipments that did not include any raw extrusions. The "raw extrusions," by that, I mean no fabrications done by Reynolds.

And then more recently there have been some extrusions received both ways, some fabricated and some unfabricated.

Q. At any time during the period that Reynolds Metals Company was doing business with Windsor, which has been referred to in your direct examination, do you know of any occasion upon which Reynolds Metals Company ever shipped to Windsor Supply Company a completed door?

(Testimony of Carl Oldenkamp.)

A. A door?

Q. A completely fabricated door. A. No.

Q. When you received these component parts or these extruded parts—and from your testimony I understand them to be rather long extrusions which form the frame of a door, is that correct?

A. That's right. [137]

Q. When you received those extruded parts, what did Windsor Supply Company have to do to make those into a door?

A. Well, first of all the packages had to be separated as to component parts.

Q. They had to be separated?

A. That's right. Then the head and the sill had to be identified with rubber stampings. The dust stops had to be installed in the head and sill.

Q. What does that mean? What kind of an operation is that?

A. We use an adhesive for holding the dust stop in place.

Q. What is the dust top?

A. The dust stop.

Q. Dust stop?

A. It is a wool-and-metal-backed weather seal.

The jambs had to have the safety bumpers and the strike bumpers installed with those component parts.

The end rails, the top end rails are now presently being cut by us and drilled—I mean cut by us and tapped for the corner screws.

The bottom rails are presently cut by us to

(Testimony of Carl Oldenkamp.)

length, and the wheel carriers, along with the wheels and axles, inserted and staked in place.

Q. And the wheels and axles in all the other component [138] parts that you added to these extrusions, I assume you purchased from persons other than Reynolds Metals, is that correct?

A. That is correct.

Q. Could you have conceivably taken the extrusions that you received from Reynolds Metals and sold them to a customer as a finished door?

A. No.

Q. How long an operation is it to take and sort these extrusions and put together your component parts and package it under a Windsor label?

A. Well, in our production it's a—because of the quantity involved, by the time that we get the fabricated parts from Reynolds, it would probably take us about a week before finished doors would begin to come out of our shop.

Q. Now, did Reynolds Metals Company ever send you any of its extrusions which it sold you in cartons or boxes of any kind or shape?

A. I don't follow you there.

Q. Well, it's claimed here that Reynolds Metals Company sent the extrusions to you in a box, in a carton such as you see here in the courtroom, a long cardboard carton, and that you just took that box, threw in a couple of parts, put a Windsor label on it, and then sold it to the public. Is that what happened? [139]

A. No.

(Testimony of Carl Oldenkamp.)

Q. In what kind of a container did you receive the extruded shapes from Reynolds, if any?

A. Well, the bundles had a piece of cardboard over each end and they were strapped together.

Q. In other words, they had a cardboard over each end and were strapped together?

A. That's correct.

Q. And when you received them you had to sort them as to size? A. That's right.

Q. So, as far as you know, did Windsor Supply Company, during the time you were there, ever do any business with Panaview, the plaintiff in this action?

A. There may have been a few instances, but they were isolated cases. I don't know of any, actually, myself.

Q. When the two corporations which Mr. Mahoney has identified as being essentially operated by the same man—when they were doing business with Panaview, do you know whether or not Panaview was furnishing Windsor with a completed, marketable, sliding door; or was that all done by Windsor Manufacturing?

A. That was done by Windsor Manufacturing.

Mr. Duque: That is all: No further questions.

Mr. Mahoney: Will the reporter read the last question to [140] the witness and the answer thereto?

(The record was read.)

(Testimony of Carl Oldenkamp.)

Redirect Examination

By Mr. Mahoney:

Q. What did you mean by that answer, Mr. Oldenkamp? What was done by Windsor Manufacturing?

A. Well, the sale of Panaview doors was handled by Windsor Manufacturing; and that Windsor Supply, for general business purposes, did not buy doors from Panaview.

Q. But when Windsor Manufacturing ceased to operate, Windsor Supply took over its accounts, is that not true? A. That's right.

Q. And Windsor Supply sold to W. P. Fuller & Co. in substantially the same manner as Windsor Manufacturing Company had done, is that not true?

A. They sold W. P. Fuller, that's right.

Q. And on the same basis, is that not true?

A. I can't—

Mr. Duque: To which question I object on the ground that it is immaterial what kind of a basis they sold on.

Mr. Mahoney: I will withdraw the question.

Q. But so far as Windsor Supply, Inc., is concerned, it took over the sales accounts of Windsor Manufacturing, is that correct? [141]

A. That is correct.

Mr. Mahoney: That will be all.

Mr. Duque: No further questions, your Honor.

(Testimony of Carl Oldenkamp.)

Mr. Mahoney: No further questions.

The Court: Well, I understood that question that Mr. Duque asked the witness, the last question asked him, to mean, did Windsor assemble the doors it got from Panaview in the same manner it assembled what it got from Reynolds?

Mr. Mahoney: That is a possible construction of that question, but I don't think it is what Mr. Duque intended, your Honor.

Mr. Duque: No, your Honor. I asked Mr. Oldenkamp—

The Court: Well, I heard it, and then I heard it read back. But I place that interpretation upon it, and apparently that is not the interpretation that either one of you intended.

Mr. Duque: Well, what I was trying to find out from Mr. Oldenkamp was whether or not Panaview, when it was selling to Windsor, was selling them completed, retail marketable doors or whether they were operating in the same manner as Reynolds and Windsor, and apparently he doesn't know. So what I propose to do is to call Mr. Gunderson, who was the president of Windsor.

The Court: I don't know if we have explored his knowledge on that point or not. [142]

Resume the stand, Mr. Oldenkamp.

Were you there when this company you were with bought doors from Panaview?

The Witness: I was with Windsor Supply at that time.

The Court: Were those completed doors, ready

(Testimony of Carl Oldenkamp.)

to be sold, or did you have to do something to them, too?

The Witness: To my knowledge, and I saw the doors that Windsor Manufacturing was buying from Panaview, the doors that they were buying were completely marketable, ready-to-ship items.

The Court: Anything further from Mr. Oldenkamp?

Mr. Duque: No, your Honor.

Q. (By Mr. Mahoney): And were those doors in KD form?

A. They were, in the sense of the word, knocked-down, yes.

Q. In other words, they were shipped to you with the extrusions in the package, and no glass?

A. Yes, ready to be shipped to glass dealers.

Q. And when they got in the field, all the screws—how did you put these screws and things that were used to hold the extrusions together in the box, in the container?

The Court: In what connection?

Mr. Mahoney: The screws which were used—

The Court: Whose door? You mean the parts they received from Reynolds or the parts— [143]

Mr. Mahoney: What I am trying to ask him is:

Q. How did you put the screws for the extrusions which were assembled into a kit for a single door—how did you put those in the container?

The Court: From Panaview or from Reynolds?

Mr. Mahoney: From Reynolds.

The Witness: We put them in a paper sack.

(Testimony of Carl Oldenkamp.)

Q. (By Mr. Mahoney): They were just thrown in a paper sack, is that correct?

A. That's right.

Q. And you didn't put the vinyl weather striping in the frames in many instances, did you?

A. No.

Q. You just threw it in as you brought it off the roll, is that correct?

A. We measured it and bound it and put it in the box.

Q. In other words, you didn't even install it in the sash itself? A. No.

Q. And how long do you think it would take you to install a rubber bumper in a jamb?

The Court: Is that material? As I understand it, neither party installed the door.

Mr. Mahoney: We are talking about installing the rubber bumper in the door frame before it went out in KD condition. [144]

The Court: Did that happen?

The Witness: When we take the parts from Reynolds, we put the bumpers on those.

The Court: What did you do from Panaview? Were they already on?

The Witness: Windsor Manufacturing received a complete kit with everything in it.

The Court: Complete in the sense in which you now ship it?

The Witness: That's right.

The Court: Then answer Mr. Mahoney's question. How long would it take to put on a stop?

(Testimony of Carl Oldenkamp.)

The Witness: Oh, there are four bumpers on a door. I'd say three or four minutes apiece.

Mr. Mahoney: That will be all.

Mr. Duque: May I interrogate the witness, your Honor?

The Court: Yes.

Recross-Examination

By Mr. Duque:

Q. You talk about "knocked-down doors," Mr. Oldenkamp. By "a knocked-down door," what do you mean?

A. Well, we mean everything—when we sell it to our customer, everything but the glass.

Q. In other words, what Windsor bought from Panaview [145] was a completed, marketable, knocked-down door? A. Right.

Q. What they bought from Reynolds were extrusions which constituted component parts to a door? A. That's right.

Q. But you would then add the other component parts, package it, and sell it to your customer as a knocked-down door? A. That's right.

Q. But you never bought any knocked-down doors from Reynolds Metals Company, did you?

A. Not in the sense that we sell it.

Q. In other words, you bought the component extrusions for a knocked-down door from Reynolds— A. Right.

Q. —but not the knocked-down door itself, is that right? A. That's right.

Mr. Duque: That is all.

The Court: You may step down, Mr. Oldenkamp. You are excused.

(Witness excused.)

The Court: What about Mr. Oldenkamp's records here?

Mr. Mahoney: Yes, your Honor, we were just about to make an offer there. There are the Fuller invoices which we would [146] be happy to release to Mr. Oldenkamp. And can't we release the bulk of this material? There are a few items which we might need for cross, out of folders which are marked "Reynolds." Could you do business without those for a couple of days, perhaps?

Mr. Oldenkamp: Well, I suppose; if it is going to expedite the trial, we can leave them here.

The Court: Very well, Mr. Oldenkamp.

Mr. Mahoney: Let us get the file for Mr. Oldenkamp which contains the Fuller invoices, and we will release them to him now.

The Court: Those were marked as what exhibit?

Mr. Mahoney: Those were marked, I believe, your Honor, as Exhibits—

Mr. Duque: 9 and 10.

Mr. Mahoney: We are not releasing some of the material which is in No. 9.

The Court: Well, are you releasing any of it? According to my notes, we have Exhibits 9-A, -B, -C, and -D.

Mr. Mahoney: We will be keeping 9, your Honor, and releasing 10.

The Court: Is it agreeable that Exhibit 10 for identification be returned to Mr. Oldenkamp?

Mr. Duque: Yes, your Honor.

The Court: Very well. So ordered pursuant to stipulation. [147]

Mr. Mahoney: Your Honor will recall that at the initiation of the action of this trial there was a discussion of the stipulation that the various affidavits of the witnesses be accepted as testimony, and I believe that that stipulation was that we would both share in the interest between both parties to the action. Now, there are numerous conclusions in these affidavits which relate to such matters as custom in the trade, which would permit variance in the terms of the "Acknowledgment." And the plaintiff is in the position where, if it is necessary for us to rebut these conclusions made by the various deponents in the affidavits, we could now put on witnesses who would rebut those conclusions regarding the practices in the trade as propounded by the deponents of the defendants here in those affidavits.

It is our position, generally, that the "Acknowledgment" and the terms thereof are so clear that there is no room for testimony regarding custom in the trade. But if your Honor is going to accept the statements of the deponents in the affidavits to that effect, then we will necessarily be compelled to put on rebuttal testimony.

The Court: That would be rebuttal, though, would it not, and not part of your case in chief?

Mr. Mahoney: That is correct.

The Court: I don't know what the defendant may offer.

Mr. Mahoney: But there is already testimony which we [148] have to rebut in those affidavits.

The Court: They haven't been offered yet.

The stipulation was, as I understood it, that if counsel so desired any affidavits on file might be offered as, pro tanto, the direct testimony of the affiant, subject to cross-examination and subject to supplementing the affidavit with further direct testimony.

Mr. Mahoney: This is a situation which I desire to clarify, your Honor, at this moment.

The Court: None have been offered.

Do you intend to offer any in evidence?

Mr. Mahoney: No. I am bringing this up to see if Mr. Duque desires to offer these affidavits.

Mr. Duque: Well, your Honor, my understanding was identical to the court's understanding.

The Court: Do you expect to offer any?

Mr. Duque: We haven't offered any yet.

The Court: Do you expect to offer them? That is Mr. Mahoney's question, as I understand it.

Mr. Duque: Well, it depends upon what the plaintiff's case consists of, your Honor. I may or may not offer them. I have all the witnesses here in court. If we put on testimony, I may stipulate that the affidavits may be considered direct, and

let Mr. Mahoney cross-examine, if it will expedite the trial. [149]

What I am trying to say is that I am perfectly happy to offer the affidavits in evidence as the direct testimony at the appropriate time, your Honor.

Mr. Mahoney: I will then call the next witness, Mr. Reznick.

The Court: Well, for the purpose of rebutting—

Mr. Mahoney: Not for the purpose of rebutting; direct testimony, your Honor.

JERRY REZNICK

called as a witness on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Jerry Reznick.

The Clerk: How do you spell your last name?

The Witness: R-e-z-n-i-c-k.

Direct Examination

By Mr. Mahoney:

Q. What is your full name?

A. Jerry L. Reznick.

Q. Where do you reside?

A. 5758 Noble Avenue, Van Nuys.

Q. What is your connection with Panaview Door & Window Co.?

(Testimony of Jerry Reznick.)

A. I am vice-president and general manager of the [150] Panaview Door & Window Co.

Q. Do you have any other offices in the associated Companies?

A. Yes, sir. I am also vice-president in Glide Windows, Incorporated.

Q. Now, Mr. Reznick, what are your duties as vice-president of Panaview Door & Window Co.?

A. To supervise the general run of the business, such as to see that orders come in, that purchases are made in proper time, and production, and so forth, in general.

Q. Do you handle financial negotiations for the corporation? A. Yes, I do.

Q. And were you conversant with the development of the Panador sliding door which was developed by Mr. Grossman? A. Yes, I am.

Q. Can you explain how you would keep in touch with such development by Mr. Grossman?

A. Well, when Mr. Grossman gets an idea about developing a new product, which has happened during our association in the past years, he would come to me and tell me that that is what he is working on. And, of course, I would also either agree or disagree to that idea, whether it's a good idea to continue with that kind of a new product.

Mr. Duque: Your Honor, I am going to be required to [151] object to any conversations or discussions between Mr. Grossman and Mr. Reznick as being hearsay as to this defendant.

And I move to strike the last portion of the wit-

(Testimony of Jerry Reznick.)

ness' answer, as to what Mr. Grossman told him about the development of the door.

Mr. Mahoney: Your Honor, these conversations are exceptions, if they can be considered hearsay, to the hearsay rule in that they constitute verbal acts.

The Court: What is the purpose of offering it?

Mr. Mahoney: The purpose of offering it is to show that Mr. Reznick was directly concerned from the very first with the relationship between Reynolds Metals and the plaintiff here as is concerned with the Panador, and that Mr. Reznick, by a natural evolution of events, became the instrument whereby the first relationship with Reynolds Metals was established to manufacture the extrusions for this door for plaintiff here. This is a little background history.

The Court: What difference does it make whether they debated it a long time or did it on the spur of the moment?

Mr. Mahoney: I didn't expect the witness to answer at length. I just asked him if he knew, and how he would know about the development like this, to show the reasonability of the next—

The Court: Well, he is the general manager of the company. I would assume he knows, like most general managers, [152] practically everything that is going on.

Mr. Mahoney: Well, I will make it a subject of judicial notice that he would know anything of that

(Testimony of Jerry Reznick.)

importance, when it was made, such as a new product.

Q. Mr. Reznick, do you recall the first person associated with the Reynolds Metals Company with whom you discussed the Panador sliding door?

A. Yes. It was Mr. Harry Sargeant.

Q. Was there anybody else present at this discussion?

A. No. There was just he and I. We were just standing sort of on the side, among a crowd of people that was at a party in Seattle, Washington, when Mr. Sargeant referred to the—

Mr. Duque: Just a moment, Mr. Reznick.

May I interrupt, your Honor, to get the date of this conversation? We have the place and the persons present.

Mr. Mahoney: I was going to ask the date just as soon as he finished.

The Court: Gentlemen, while we are interrupted, the last motion to strike is denied.

Lay the foundation so we all may know the time, place, and persons present.

Q. (By Mr. Mahoney): When did this conversation take place?

A. It was in the early part of '54. It was [153] at a meeting of Fuller—of the W. P. Fuller Company. We, as a basic supplier for W. P. Fuller—and when I say "we," I mean Panaview—were invited to attend their meetings and demonstrate our product. And we were traveling from one regional branch to another regional branch. And it

(Testimony of Jerry Reznick.)

was taking place from—let's see—from Los Angeles, San Francisco, Seattle, and other towns throughout the twelve Western States.

At one of the parties, Mr. Sargeant—

Q. When did this party take place?

A. I believe it was in Seattle, Washington. The manager of that branch gave a party for all these traveling salesmen and the suppliers.

Q. Now, who else was present at this conversation that you had with Mr. Sargeant?

A. At the conversation, no one else was present. It was just Harry Sargeant and myself were discussing—we were debating at that time about a certain disagreement that there was between Reynolds Metals—at that time there was a disagreement between Reynolds Metals and Panaview Door & Window Co., which it seemed to me that Harry Sargeant was not even aware of at that time, because it was the year previous to that we had received material from Reynolds Metals for a certain Thermo-pane door that was ordered a year before that. Instead of the six weeks delivery, which they promised, it took ten. [154]

Q. Who was this door ordered by?

A. By me.

Q. What company?

A. By Panaview, I mean, to Reynolds, through their salesman. And one day, when they didn't deliver—they were late in delivering, and in the meantime that order that we had, the specific order number of Thermo-pane doors, was canceled out on us.

(Testimony of Jerry Reznick.)

Nevertheless, Reynolds dumped that material. It was a matter of about 80,000 pounds. And they dumped that material and said they would accept no cancellation. We refused to pay for that material, only in the sense that it was to us only scrap value, we were willing to settle for the scrap value. And in the meantime negotiations were going on between our attorneys and their attorneys; and there was no settlement.

Q. There was no actual suit?

A. No actual suit was taking place.

Q. Why was this order canceled out by your customer? A. Because——

Mr. Duque: Just a minute, please, Mr. Reznick. I object to the question on the ground that it is completely immaterial.

The Court: What is the purpose of it?

Mr. Mahoney: Well, to show a history of—to show that they had every reason not to go back to Reynolds on this Panador situation, and also to show that there were certainly [155] relations here which had not been equitable, to say the least, and that there was inducement on the part of Reynolds to bring Panaview back into the fold, and that we didn't go running after Reynolds in an effort to get them to manufacture the extrusions for this door.

The Court: I will overrule the objection.

Have you about finished?

Mr. Mahoney: Yes. I want him to get on the direct subject matter.

(Testimony of Jerry Reznick.)

The Court: Overruled.

Q. (By Mr. Mahoney): Mr. Reznick, what was your conversation with Mr. Sargeant relating to the Panador?

A. In order to relate it to the Panador, I have to go back to that story, how it came about, and that's the only way I can relate it to the Panador.

Q. Do it briefly.

A. I will do it briefly if your Honor will permit.

The Court: Proceed.

The Witness: In that conversation Harry Sargeant asked me why we stopped buying materials from Reynolds. And he at that time indicated he knew we were using a great number of extrusions. And he said, after all, he was the first one to sell us the first carload of material.

I explained to him the reason for it, the reason we stopped buying was because of this here inconsistency in their [156] deliveries of material, and they were trying to collect—it was a matter of about \$16,000 they were trying to collect, for which they were not entitled to.

He said to me, "I will see to that if you promise that you are going to go back as our customer and buy materials from us, I will see to that, that that will somehow be settled. Either it will be taken back, that material that was sent to you, or else we will give you a long term to pay for it, whichever you will choose."

And at that time I told him that we were coming

(Testimony of Jerry Reznick.)

out—it was a secret, I said, very secret, and I said, "We haven't got the completed drawings yet, but we are coming out with a new door, don't have a name for it yet, and that door will revolutionize the sliding-door industry to the extent where"—

We always had to compete with steel sliding doors. Aluminum is a higher-priced metal, and we had to compete with the steel sliding-door industry.

I told him that Abe Grossman, my associate, had already designed a door that will revolutionize the industry and we will be using a great deal more material than we ever used before.

Now, that was the conversation at that time.

Q. (By Mr. Mahoney): Now, what did Mr. Sargeant say in response to your conversation?

A. He said that he will see to that, that some settlement [157] will take place.

Q. And did you have any further discussions with Mr. Sargeant relating to sliding doors?

A. That ended there then. Oh, yes, there was something else.

At that time he also expressed a possibility of Reynolds buying doors; for us, that is, to design and manufacture a door for them, because they were making a casement window, selling a casement window, and there was always a demand, whenever they sold a casement window, the owners of the house would also require a sliding door, and they didn't have a sliding door of their own. And he discussed with me the possibility of having us manufacture a sliding door for them.

(Testimony of Jerry Reznick.)

Q. And what was your response to that?

A. I told him that could be arranged.

Q. Now, did you ever have another conversation with the personnel of Reynolds Metals Company regarding this Panador?

A. Yes. That was later on.

Q. What time did that take place?

A. It was about two or three weeks after that, after those meetings. There were three gentlemen of Reynolds Metals came over to see us. When I say "us," I mean Mr. Grossman and myself.

Q. Who else was present at this meeting? [158]

A. At that time, Mr. Miles or Niles, their credit manager, their sales manager—

Q. Who was that?

A. Mr. Yates—and their salesman.

Q. Who was that?

A. Al Kavich, I believe, was his name.

Q. Now, where did this conversation take place?

A. That conversation took place in Mr. Grossman's office.

Q. And how did the subject matter of the Panador come into that conversation?

A. We told them there, too, a new sliding door was being designed and that we will need a lot of aluminum extrusions. And they were anxious to take the order for the extrusions provided we could settle this dispute over the \$16,000.

Q. How did you settle the dispute?

A. Well, we finally agreed and we settled. We agreed to make it in a long-term note; let's say

(Testimony of Jerry Reznick.)

\$2,000—it was about \$2,000 a month; we agreed to pay them off. And we felt that perhaps during that period of time there would be a chance to sell that material.

Q. Now, Mr. Reznick, did you ever have any dealings with Mr. McLin of Windsor Manufacturing Company? A. Yes. [159]

Q. Did these dealings take place while Windsor Manufacturing Company was still buying Panador doors from your company? A. Yes.

Q. And do you recall what the subject matter of the conversation was, and where it took place? Where did the conversation take place?

A. In Pasadena, in Mr. McLin's office.

Q. Who was present at this conversation?

A. At that time Mr. Gunderson was present. Of course, Mr. McLin. Mr. Terpinson was there, and also myself. There was also another gentleman present. I don't recall his name, but he was one of Mr. McLin's men.

Q. Now, what was the subject matter of the conversation?

When did the conversation take place? Do you recall that? A. It was late '54.

Q. What was the subject matter of the conversation? A. Money.

Mr. Duque: To which we object on the grounds that it is hearsay so far as this defendant is concerned, and incompetent, irrelevant and immaterial.

Mr. Mahoney: Your Honor, it is not hearsay because, once again, this is a series of verbal acts

(Testimony of Jerry Reznick.)

in which it will be established that Mr. McLin and Windsor Manufacturing Company [160] were induced to sever their relationship with Panaview Door & Window Co. because they were already negotiating and had negotiated with other parties to obtain a supply of extrusions, and, therefore, it was easy for Windsor Manufacturing Company to jump from one supplier to another; and that, as the records will show, this supplier was the Reynolds Metals Company.

The Court: I don't see the materiality of it. That's a matter of everyday practice, I suppose.

Mr. Mahoney: It isn't a matter of everyday practice, your Honor, for someone——

The Court: One customer will change to another supplier.

Mr. Mahoney: That is true where the suppliers are on an even footing, your Honor. But you would have to look long and hard to find a situation in which an extruder was going after the customer of a company which was purchasing extrusions from the extruder. I think that you would probably find that this is probably a case of first impression and that the facts here are unique, except for a perfectly standard item which was manufactured by the extruder and sold directly to the trade.

The Court: Is it material here whether Windsor was already a customer of Reynolds?

Mr. Mahoney: It certainly is material, because —we are not showing that Windsor was already a customer of [161] Reynolds.

(Testimony of Jerry Reznick.)

The Court: Assuming that it was, is it material whether they were or were not already a customer?

Mr. Mahoney: It certainly is material, your Honor, because it shows that with one hand Reynolds, in a position of trust and confidence, was doling out material to Panaview, and at the same time it was establishing Windsor as a competitor of Panaview for its own profit.

The Court: What does this conversation have to do with that?

Mr. Mahoney: This conversation will show that Mr. McLin, when they began discussing the subject matter of debts which had accumulated and when they would be paid, Mr. McLin said, "Well, if you don't go on supplying us, we will then terminate our relationship. And we already have established a source of supply."

And we will show that the break with Windsor came about because of the fact that Reynolds Metals was facilitating Windsor's scot-free departure from Panaview, and it would not have done so if there had not been a source of supply readily and immediately available, which is a rather important aspect of the situation.

The Court: Well, it isn't part of the claimed wrong here, is it, that Reynolds took away a customer from Panaview?

Mr. Mahoney: It is certainly part of the [162] unfair competition aspect of the thing, that in a fraudulent assumption of a fraudulent position wherein it was acting as the sole supplier for Pana-

(Testimony of Jerry Reznick.)

view, it then, behind Panaview's back and in a complete breach of its equitable relationship, went and supplied Windsor with the very materials which only Panaview was entitled to.

The Court: Wouldn't the situation be the same, according to your theory, if Reynolds supplied X, whom you had never heard of, who is a newcomer to the business?

Mr. Mahoney: Well, the wrong was aggravated by the fact that they didn't go out and—

The Court: Aggravated legally or aggravated emotionally?

Mr. Mahoney: Aggravated legally.

The Court: How was it aggravated legally?

Mr. Mahoney: Because there was already a direct connection between Panaview and Windsor.

The Court: Is it part of your claim here of unfair competition that Reynolds took Windsor away from you as a customer?

Mr. Mahoney: Part of our claim here is, the fraudulent acts of Reynolds, which will be detailed by the witnesses, constitute unfair competition in accordance with California statutes pertinent thereto.

The Court: But you would say that if Reynolds, under the circumstances here, supplied X, wouldn't you, who is a [163] competitor?

Mr. Mahoney: We'd say that so far as the breach of contract was concerned.

The Court: Well, you would say it as far as the entire case, wouldn't you?

(Testimony of Jerry Reznick.)

Mr. Mahoney: Yes, your Honor.

The Court: And it wouldn't matter whether X had ever done business with Panaview or not, would it, as long as X is a competitor of Panaview?

Mr. Mahoney: Well, no, I think, your Honor, here Windsor is in a different position from X. It is obvious on the facts that there was an established relationship between Panaview and Windsor, which was a benefit to Panaview. If X came along cold and—

The Court: Well, all right. Are you suing here to recover damages arising from the wrongful acts of Reynolds in taking away a customer from you?

Mr. Mahoney: We are suing here for breach of contract.

The Court: But it has nothing to do with taking a customer away from Panaview, does it?

Mr. Mahoney: It certainly does, your Honor, because the acts of Reynolds in this regard were in wilful aggravation of the wrong and not emotional aggravation. But we are asking for punitive damages here because of Reynolds' flagrant acts in regard to its primary customer, Panaview. [164]

The Court: Are you offering this on the issue of punitive damages?

Mr. Mahoney: We are going to offer something else on that, your Honor. But this is the starter.

Frankly, what this shows, your Honor, is that the Reynolds Metals Company, all the way through this situation, was in breach of its relationship.

(Testimony of Jerry Reznick.)

with trust and confidence, that it did everything it possibly could, if it had intended to destroy.—

The Court: Just stop it a minute and tell me what the purpose of it is. Is the purpose to show the relationship of the parties? Is that the purpose?

Mr. Mahoney: That is correct, your Honor.

The Court: It will be received for that purpose only. Overruled.

Q. (By Mr. Mahoney): Mr. Reznick, what was your discussion relating to the Panader with Mr. McLin?

A. At that time, Mr. McLin—that is, the Windsor Company, owed us somewhere around \$60,000. I came there to see if we can collect all or part of that. And that was my purpose of the visit there.

When I came there, Mr. McLin took us in the office and said, "We can't pay you now. We will go through our records and we will see, and perhaps in the future we will—in a few days or in a couple of weeks we will be able to pay you [165] then. But in the meantime, we demand that you send us merchandise."

I says, "We can't send you any more because so far we can go only that much with you, \$40,000"—or whatever the amount was at that time. It was more than the credit that that company deserved.

And here are the words that he said to me—he said, addressing me by my first name: "Jerry, I have spent between \$80,000 and \$85,000 to develop the Windsor Company, to develop a client like W. P. Fuller Company, and I want you to know

(Testimony of Jerry Reznick.)

that I have taken measures to protect myself in case you don't supply me with merchandise. If you don't supply me with merchandise, I will be bound to go elsewhere. In fact," he says, "I can have within two weeks ready doors delivered to me." That is the exact expression he said. And by then we wound up not collecting any money.

Q. Mr. Reznick, when did you first discover that Windsor Supply Company was selling or supplying doors to the trade which were identical, or substantially identical, with Panador?

A. About two months later.

Q. Well, can you—

A. It was in the first—the early part of '55 when an employee of McLin called me and told me about it. Up to that time we didn't know. [166]

Q. Do you remember the name of this employee?

A. I believe his name was George Birch.

Q. What did he tell you?

Mr. Duque: Your Honor, again I object on the grounds that it is incompetent, irrelevant, and immaterial, and hearsay insofar as this defendant is concerned.

Mr. Mahoney: Your Honor, it certainly is not incompetent, irrelevant, or immaterial. We are considering the very—

The Court: It's hearsay, though.

Mr. Mahoney: Well, it constitutes, once again—

The Court: If you are offering it as to the truth of it—state your purpose. Don't argue. Don't argue unless I ask you for argument. State your purpose.

(Testimony of Jerry Reznick.)

Mr. Mahoney: My purpose here is to show how and when the plaintiff first discovered the infringement, the acts that—

The Court: He said that. He said in the early part of 1955 an employee, whom he thinks was named Birch, told him. Now, what difference does it make what Birch said to him?

Mr. Mahoney: I will withdraw the question, your Honor.

Q. (By Mr. Mahoney): Did you, after that communication to you by Mr. Birch, attempt to contact any of the representatives of the Reynolds Metals Company?

A. No. But between that time a Reynolds [167] Metals representative was in my office, their salesman, trying to sell me.

Q. What was his name?

A. Al Kavich. He came in my office asking for an order for materials. And, in fact, I believe we had some orders in the place. He asked what to do with that order, and I told him he might as well cancel it out because we are not going to buy any more material from Reynolds, knowing what wrong they did to us.

Q. And what did Mr. Kavich say to that?

A. He was very surprised and said it couldn't be. In fact, he said he will talk to the other salesmen in that territory who might be supplying to Windsor, and he will let me know about it.

And about a week later he called me and told

(Testimony of Jerry Reznick.)

me that the salesmen weren't selling any extrusions to Windsor Supply Company.

To get down to the core of it, I again contacted that person, George Birch, to find out whether it was true what he was telling me. And he told me yes, that that was true, but they were getting it through the parts department, and that's the reason their salesman couldn't find any record of selling their extrusions.

Q. The parts department—

A. Of Reynolds Metals Company, which means prefabricated [168] parts.

Q. Mr. Reznick, did you ever have any conversation with any other personnel of Reynolds Metals Company regarding this matter of the supply by Reynolds of extrusions to Windsor Supply Company?

A. Yes, with Mr. Miles over the phone a few times.

Q. And what was the purpose of the conversations?

A. It was always—whenever he called me, I would always tell him what—well, I won't use that word in court—what a trick they played on us in giving credit to a company that we couldn't collect money from, and he gave them credit.

And he said it was against his judgment; he was against it. He personally said it to me.

Q. Mr. Reznick, did the sale by Reynolds Metals Company of the component extrusions for an aluminum frame sliding door, which was substantially

(Testimony of Jerry Reznick.)

identical, except in minor details, with the Panador, handicap the sales of the Panaview Door & Window Co.? A. Yes.

Mr. Duque: To which question I object on the grounds it calls for a conclusion of the witness, and is not the best evidence.

The Court: What would be the best evidence?

Mr. Duque: What would be the best evidence, your Honor? [169]

The Court: Yes.

Mr. Duque: That the sales of Panaview dropped as a result of the delivering of extrusions by Reynolds to Windsor. And I think that their books and records would be the best evidence.

I think this is a sheer conclusion of this witness.

And in the second place, I don't see how it could be relevant here in this case to say that the sale of extrusions by Reynolds to Windsor would be relevant as to any cause of action that is sued upon here. It couldn't be relevant on the breach-of-contract cause of action. It can't be relevant on the alleged breach of trust and confidential relationship, no part of which has been proven. Nor can it be relevant to the unfair competition, no part of which has been proven.

The Court: It is relevant to the issue of damage, isn't it? It's his conclusion, but it is a conclusion that I think the general manager of a business should be permitted to state. Your objection, as I view it, goes to its weight, and you may cross-examine him fully on it.

(Testimony of Jerry Reznick.)

His answer may stand. I believe his answer was "yes," was it?

The Witness: Yes.

Q. (By Mr. Mahoney): Can you explain that, Mr. Reznick?

A. Yes, I can explain. When we first developed the door, the Panador, we call it now, I was in constant touch with [170] the Fuller Company. I had taken a sample of that door and demonstrated it to W. P. Fuller in Mr. Fuller's office, himself, Palmer Fuller's office, who I believe is the president of the company; the manager of W. P. Fuller, Mr.—oh, what's his name? I will think of it. Oh, Walsh. Jack Walsh was present. And so was Ben Gunderson, representing Windsor. And we were naturally the prime supplier. And we showed him that door. And when I demonstrated that sample door, which is a sample exactly similar to this one, they were very much impressed. And then we told them the price we could sell the door for, and they were immediately impressed. And immediately they were talking about a 3,000-door order, an initial order of 3,000 doors, and from then a minimum of a thousand doors a month. That was the discussion. Then it ended there, of course, with the possibility—I was not the one to take the order. It was up to Windsor, which is Gunderson, to take the order.

A week later, in Gunderson's office, Mr. Gunderson showed me the order from them for 3,000 doors. But we never did receive the order for the 3,000 orders. All we supplied them probably was a small

(Testimony of Jerry Reznick.)

amount of the doors in comparison to the 3,000-door order.

Mr. Duque: Your Honor, I move that the entire answer be stricken as nonresponsive to the question and as a self-serving statement by the witness, and hearsay as to this [171] defendant.

Mr. Mahoney: Your Honor, the witness was asked to explain his conclusion and to explain why he believed the actions of Reynolds harmed the plaintiff here, and he has explained it in his own language as plainly as he can. And I think the statement is competent on the same basis that he was general manager.

The Court: The motion is denied.

Q. (By Mr. Mahoney): Mr. Reznick, do you recall approximately when your relationship with Reynolds, so far as the manufacturing of extrusions for the Panador was concerned, was terminated?

A. Yes. That was after we established the fact and that I was fully convinced that they were supplying doors to Windsor.

Q. Now, during the period in which Panaview was being supplied with extrusions by Reynolds Metals Company and after the termination of your relationship with Windsor, did you have difficulty with unbalanced shipments received from Reynolds Metals Company?

A. Yes, very much so. They would ship parts of a certain extrusion and then—oh, yes. To get back—in order to answer this question I have to get back to our original negotiations, when we first

(Testimony of Jerry Reznick.)

started negotiations on that Panador. I explained to the sales manager and the credit [172] manager at the time that to us one extrusion only is worthless, that unless we have all the parts together to make one door so that that door can be made into a unit and then shipped and invoiced, that that door is worthless to us. Many times they would send material—they were sending before, in our previous experience with them, they were sending material in partial shipments but not related to each other. We have made an agreement with them, with the credit manager, with Yates—I have made an arrangement that until all of the order is completed—it will be due on 30 days from the date of the order, that will be when the order was completed. That was my arrangement with them.

Q. And your answer to the question relating to the difficulties encountered? A. Oh, yes.

Q. The difficulties which were encountered by incomplete shipments?

A. Yes. That was in the latter part of the year of 1954—that was worse—where they sent out certain parts and held back on the rest of the shipment. We were stymied with a great number of material and the orders that we couldn't fill. And that created a great hardship, and we would either have to let men go, on the job, or else close the shop. That was the matter.

Q. And did you encounter this difficulty in the period [173] from January, 1955, to June, 1955?

(Testimony of Jerry Reznick.)

A. In the beginning it was so bad, at the end of the year 1954—

Q. We are not talking about the beginning. I am talking about January, 1955, to June, 1955.

A. That was worse. That was the worst period of those bad shipments.

Mr. Mahoney: That will be all. Your witness, Mr. Duque.

The Court: Was W. P. Fuller the plaintiff's customer or was Fuller the customer of Windsor?

The Witness: Well, W. P. Fuller was a customer of Windsor. That is, Windsor was acting almost like an agent through which we—we were selling to Windsor, and Windsor was selling to Fuller.

The Court: But your company never sold Fuller, as such?

The Witness: At that time Windsor—we were selling Windsor.

The Court: Were you ever selling Fuller?

The Witness: We are selling Fuller now.

The Court: I mean prior to the time that Reynolds started supplying Windsor, was Fuller ever the customer of the plaintiff here, your company?

The Witness: Fuller was the customer of Windsor, and we were supplying Windsor.

The Court: We will take the noon recess at this time [174] until 2:00 o'clock.

(Whereupon, a recess was taken until 2:00 p.m. of the same day.) [175]

November 22, 1955—2:00 P.M.

The Court: Are there any ex parte matters?

The Clerk: No, your Honor.

The Court: You may proceed with the case on trial.

JERRY REZNICK

called as a witness on behalf of the plaintiff, having been previously sworn, resumed the stand and testified further as follows:

Mr. Duque: We have no cross-examination of Mr. Reznick, your Honor.

The Court: Very well. You may be excused.

(Witness excused.)

The Court: Plaintiff's next witness?

Mr. Mahoney: Your Honor, I would like to call Mr. Grossman to the stand once again because he has discovered in his personal records some evidentiary material consisting of a series of letters between the Reynolds Metals Company and Mr. Grossman personally regarding the subject of the permission to use dies.

The Court: You may recall Mr. Grossman for further direct examination. [176]

ABRAHAM GROSSMAN

a witness called by the plaintiff, having been previously sworn, was recalled and testified further as follows:

Further Direct Examination

By Mr. Mahoney:

Q. Mr. Grossman, I show you Plaintiff's Exhibit No. 16 for identification, which is constituted by a letter dated March 19, 1951.

Mr. Duque: May I inquire of counsel? Have I seen any of these?

Mr. Mahoney: I am going to show them to you as I present them. Mr. Grossman has just produced these.

The Court: Hand over the rest of them to counsel and let counsel examine them while you proceed, if you will, Mr. Mahoney. This is Exhibit 16 for identification that you have, is that correct?

Mr. Mahoney: That is correct, No. 16.

Q. (By Mr. Mahoney): Mr. Grossman, I ask you to explain the circumstances which dictated the sending of the letter, Plaintiff's Exhibit No. 16 for identification?

A. During this particular period I had gotten patents on the Glide windows and doors that necessitated an agreement with Glide Windows and me where the ownership, as part of the agreement between us, the ownership of the dies was to be in my [177] name.

At that time a Mr. Lewis from the Reynolds sales department was told, when he made a call on us, that this was going to take—

(Testimony of Abraham Grossman.)

The Court: Told by you?

The Witness: By me, yes. When he made a call to us, he was told that this was to be done and that the dies were to be changed to my name, the respective dies. And I told him to go ahead and order, or allow the company to order material on those dies. He told me that he would have to have a letter from me giving Reynolds permission for my own company to have material run through those dies. And these are the letters pertaining to that particular event.

Q. (By Mr. Mahoney): I show you a letter to the Reynolds Metals Company directed to Glide Windows, Inc., marked Plaintiff's Exhibit 17 for identification.

Mr. Duque: May we have the date on that?

Mr. Mahoney: April 11, 1951.

Q. (By Mr. Mahoney): And I ask you if this is the actual copy of a letter received from Mr. Lewis of Reynolds Metals Company?

A. This is the letter, the original, I believe.

Q. And this is the letter requesting permission from you, as owner of the dies— A. Yes.

Q. —as set forth therein to permit Reynolds Metals [178] to fabricate extrusions for Glide Windows from the dies which were in your name, is that correct?

A. Well, in this last paragraph it says, "We should have as soon as possible * * *"

The Court: The letter speaks for itself, doesn't it?

(Testimony of Abraham Grossman.)

Mr. Mahoney: Yes, your Honor.

The Witness: Oh.

The Court: Is what you have there a chain of correspondence?

Mr. Mahoney: Yes, your Honor.

The Court: Why don't you have it all marked and ask him about it at one time?

Mr. Mahoney: Will you please mark these documents as Plaintiff's Exhibits 18, 19 and 20 for identification?

(The exhibits referred to were marked Plaintiff's Exhibits 18, 19 and 20 for identification.)

Q. (By Mr. Mahoney): I now show you Plaintiff's Exhibits 18, 19 and 20 for identification and ask you if you sent those letters to Reynolds Metals Company in order that the use of the dies by Reynolds Metals Company for Glide Windows, Inc., might be clear? A. Yes.

Mr. Duque: I object to the question, your Honor. I have no objection to him answering whether he sent them or received them, but what the "in order" was is calling for a [179] conclusion of the witness and is leading and suggestive. The letters speak for themselves.

Mr. Mahoney: I will rephrase the question.

Q. (By Mr. Mahoney): Are these documents, Plaintiff's Exhibits Nos. 18, 19 and 20, true copies of letters which were forwarded to Reynolds Metals Company by your company? A. They are.

The Court: On or about the dates they bear?

(Testimony of Abraham Grossman.)

The Witness: Yes.

Q. (By Mr. Mahoney): What was your purpose in sending those letters to the Reynolds Metals Company?

Mr. Duque: To which question I object, your Honor, on the grounds that the letters speak for themselves. And on the further grounds that it has been asked and answered. He explained the entire circumstances.

The Court: Sustained on the latter ground.

Mr. Mahoney: I now offer Plaintiff's Exhibits 16 through 20 in evidence.

Mr. Duque: To which offer we object, your Honor, on the grounds that the offer in evidence is incompetent, irrelevant and immaterial; it is between Glide, Incorporated, and Reynolds Metals Company; Glide, Incorporated, not being a party to this action. It relates to dies that relate to matters which apparently were patented and which require, by law, a permission for use; and for that reason has no bearing [180] on the issues in this case.

The Court: May I see the documents, Mr. Clerk?

(Whereupon, the documents were handed to the court.)

The Court: These exhibits, 16 to 20, inclusive, deal with dies for the Glide Windows?

The Witness: Yes.

The Court: Those were patented products, were they?

(Testimony of Abraham Grossman.)

The Witness: As far as the product was concerned with the Glide Window Company.

The Court: You held the patents?

The Witness: I did.

The Court: Was Glide Windows, Inc., licensed to manufacture under those patents?

The Witness: Yes.

Mr. Mahoney: Well, your Honor, it has not been shown here that there is any relationship whatsoever so far as the Reynolds Metals Company is concerned as to whether the existence of patents would influence their conduct in regard to dies.

The Court: There are some pencil markings on Exhibit 18. Do you offer those?

The Witness: No. Those aren't relative to the letter. Those scribblings are on some other matter. The copy just happened to be at hand.

The Court: What is the purpose of the offer, to show [181] the practice?

Mr. Mahoney: The purpose of the offer is to show the practice of the Reynolds Metals Company for dies which were ordered by a party and which were in the name of the party, just to show the practice of Reynolds in obtaining permission for the use of another party or for the use—for the benefit of another party by Reynolds Metals Company.

The Court: Do you expect to show other instances?

Mr. Mahoney: This is the only instance we have at the present time, your Honor, because since then

(Testimony of Abraham Grossman.)

Panaview and Glide have not given permission to any other parties to use their dies.

The Court: The objection is overruled. Exhibits 16 to 20, both inclusive, are received in evidence.

(The exhibits referred to, marked Plaintiff's Exhibits 16 to 20, inclusive, were received in evidence.)

Mr. Mahoney: Your Honor, by the courtesy of Mr. Duque, counsel for the defendant, in complete conformity in this regard with a subpoena which was issued against Mr. Yates, Mr. Duque instructed Mr. Harrison, who, I believe, is the comptroller of the Phoenix Division, to bring these records, even though they weren't available to Mr. Yates. And included in these records is the original purchase order from Panaview directed to Reynolds Metals Company, and the original acknowledgement, in pencil, with the form on the back of it, [182] paragraph 11. And I wonder if Mr. Duque would stipulate that this whole file could go in in order to prevent tearing the file apart.

Mr. Duque: I think we would rather do that, your Honor, if we may; although I have no objection to your taking these out. We can put them right back in.

The Court: Well, whatever you gentlemen desire to do. If you wish to offer the entire file it may be received.

Mr. Duque: We have no objection to them com-

(Testimony of Abraham Grossman.)
ing out of the file, your Honor. We can replace them.

The only thing I would like to state for the record is to state that it does come from our file, and that at the final conclusion of the litigation that it be returned to the defendant.

The Court: If there is no objection, why not keep the entire file together?

Mr. Duque: We have no objection to that.

The Court: Is it offered in evidence?

Mr. Mahoney: Yes, your Honor, it is offered in evidence as Plaintiff's Exhibit No. 21.

The Court: A file of Reynolds Metals Company.

Mr. Duque: We have no objection.

The Court: Very well. Exhibit 21 will be received in evidence. [183]

(The exhibit referred to, marked Plaintiff's Exhibit 21, was received in evidence.)

254

TIFF'S EXHIBIT NO. 21

3/16/12/51

REYNOLDS METALS COMPANY

(1957 5-50) PLEASE ENTER OUR ORDER PUR THE FOLLOWING MATERIAL AT THE PRICES AND ON THE TERMS STATED HEREON

ITEM	TERMS	CUST ORDER NO.	DATE OF CUST. ORD.	PRODUCTION ORDER NO.
25 Kavich	Net-30	1-583	4-20-54	339992
SHIP TO				
PANAVIEW 13434 RAYMORE ST. NORTH HOLLYWOOD, CALIF.			SAN 1	
Shipping lot S1d -	Planes	SHIPPING POINT	SCHEDULE	SALESMAN REP.
(to Durilite by RMC)				h m 5/11
DESCRIPTION	PRODUCT CODE	PRICE	QUANTITY	CREDIT BY
# * 10414A (cust, t = 1x) 635-5 ext 17-11-6341	.418±	2		R.M. Johnson
6 ft. x 12 ft. 2 in. t.				
# * 10414AC (cust, t = 1x) 635-5 ext 17-11-6340	.418±	2		
6 ft. x 12 ft. 2 in. t.				
# * 10414A (cust, t = 1x) 635-5 ext 98-93	.150±	2		
6 ft. x 12 ft. 2 in. t.				
# * 10415A (cust, t = 2x) 635-5 ext 17-11-6341	.423±	2		
6 ft. x 12 ft. 2 in. t.	17-11-6341			
# * 10415A (cust, t = 2x) 635-5 ext 17-11-6340	.423±	2		
6 ft. x 12 ft. 2 in. t.	17-11-6340			
DESCRIPTION	PRODUCT CODE	PRICE	QUANTITY	CREDIT BY
# * 10418A (cust, t = 5x) 635-5 17-11-6341	.506±	2		
6 ft. x 12 ft. 2 in. t.				
# * 10418A (cust, t = 5x) 635-5 17-11-6340	.190±	2		
6 ft. x 12 ft. 2 in. t.				
# * 10419A (cust, t = 1x) 635-5 17-11-6341	.325±	2		
6 ft. x 12 ft. 2 in. t.				
# * 10419A (cust, t = 1x) 635-5 17-11-6340	.125±	2		
6 ft. x 12 ft. 2 in. t.				
# * 10420A (cust, t = 1x) 635-5 17-11-6341	.325±	100		
6 ft. x 12 ft. 2 in. t.				
# * 10420A (cust, t = 1x) 635-5 17-11-6340	.125±	100		

255

PAGE 3 of 4

DESCRIPTION	PRODUCT CODE	PRICE	QUANTITY
10415A (west pt + 2x) duckling	98.93	*150.00	ONE
10916A (west pt + 3x) G3ST5 ad 17-11-6341	8.416#	=1	
10916A (west pt + 2x) G3ST5 ad 98.93	*150.00		
10417B (west pt + 4x) duckling	17-50-6341	8.491#	4000*
10417B (west pt + 4x) duckling	98.93	*190.00	ONE CVR 245

AGE 4 of 4

DESCRIPTION	PRODUCT CODE	PRICE	QUANTITY
* 10421A (west + 8x) Gests f. oil shape x 132 tins	1710-6340	\$ 4.60#	1000 ^{ea}
* 10421A (west + 8x) disc cap 9893		\$ 120.00	one
* 10426A (west + 9x) Gests f. 2nd shape x 132 tins	1711-6331	\$.554#	50
* 10426A (west + 9x) disc cap 9893		\$ 120.00	one only

TAX STATUS - 1

For 1-12-10-11-12 Klomis = AG52399

Cost: requests shipment June 12th or before.

Scaling down - there are complete parts so be
sure to use all sections & similarly

CHECK IMPORTANT QUALITY FACTORS WHICH MERIT SPECIAL ATTENTION											
<input type="checkbox"/> THICKNESS <input type="checkbox"/> STAIN	<input type="checkbox"/> DIAM. <input type="checkbox"/> LENGTH	<input type="checkbox"/> WIDTH <input type="checkbox"/> SQUARENESS	<input type="checkbox"/> DRAWING <input type="checkbox"/> ROUNDNESS	<input type="checkbox"/> NON-EARING <input type="checkbox"/> BRIGHTNESS	<input type="checkbox"/> WORKABILITY <input type="checkbox"/> EDGES	<input type="checkbox"/> FLATNESS <input type="checkbox"/> SURFACE	<input type="checkbox"/> DUST FREE <input type="checkbox"/> REQ ONLY ONE GOOD SIDE				
NUMBER OF BLOCKS IN SEQUENCE OF FABRICATING OPERATIONS											
<input type="checkbox"/> BLANK <input type="checkbox"/> MACHINE <input type="checkbox"/> ROUTE <input type="checkbox"/> SAW <input type="checkbox"/> SHEAR <input type="checkbox"/> TRIM											
BEND	TANGENT	FORMING	ROLL	BREAK	STRETCH	CURL	MACHINE	FORGE	SPIN		
DRAW			DEPTH	NO.		BEND RADIUS	DEGREE OF BEND				
WELD	TORCH	ARC	SPOT	FLASH	BRAZE	TORCH	DIP	BOLDER	ORGANIC CEMENT		
PLATE				RIVET	BOLT						
CLEANING	CHEMICAL	SOLVENT	VAPOR		CAUSTIC ETCH	ACID ETCH	COATING	ANODIC	PHOSPHATE		
PAINT				LITHOGRAPH	POLISH	SCRATCH BRUSH	HAMMER	SAND	TUMBLE		



IS NOT BINDING UPON SELLER UNLESS AND UNTIL ACCEPTED
HE IF ACCEPTED BY SELLER WILL BE FILLED BY SELLER UP

THIS ORDER IS GIVEN
BY EXPRESSLY MADE A

(Testimony of Abraham Grossman.)

[Terms and Conditions of the foregoing Order are identical to those that appear as part of Plaintiff's Exhibit No. 2—see photostat pages 91 and 92 of this printed record.]

Received in evidence November 22, 1955.

Mr. Mahoney: Your witness.

The Court: And I assume, of course, that stipulation includes the stipulation that the documents therein are all genuine and in all respects what they purport to be?

Mr. Mahoney: We so stipulate since it was produced in good faith by the defendant.

The Court: Very well.

Mr. Duque: So stipulated.

I have no questions.

The Court: Very well. You may step down, Mr. Grossman.

(Witness excused.)

The Court: The plaintiff's next witness?

Mr. Mahoney: I call Mr. Pinson.

LOUIS PINSON

called as a witness on behalf of the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Louis Pinson, L-o-u-i-s P-i-n-s-o-n.

Direct Examination

By Mr. Mahoney:

Q. Mr. Pinson, what is your full name?

A. Louis Pinson. [184]

Q. And are you associated with the plaintiff, Panaview Door & Window Co.? A. I am.

Q. In what capacity are you associated with the plaintiff?

A. I am the assistant to the general manager and assistant secretary of the corporation.

Q. In your capacity as assistant general manager and as assistant secretary of the corporation, do you have custody of the records of the corporation? A. I do.

Q. Do you supervise the production of the products of the corporation? A. I do.

Q. Have you supervised the production of the Panador sliding door for the corporation?

A. Yes, I have.

Q. And do you supervise the obtaining of materials for the products of the corporation?

A. Yes.

Q. Have you supervised the obtaining of aluminum extrusions from Reynolds Metals Company for the Panador sliding door? A. Yes, I have.

(Testimony of Louis Pinson.)

Q. And have you, in the period between November, 1954, [185] and June, 1955, encounter difficulties in obtaining complete balanced shipments of extrusions from Reynolds Metals Company for the Panador sliding door?

Mr. Duque: To which I object on the grounds that it calls for the conclusion of the witness as to what is "encountering difficulties." I have no objection to him stating what occurred.

Mr. Mahoney: I will rephrase the question.

Q. (By Mr. Mahoney): Have incomplete shipments and unbalanced shipments of aluminum extrusions from the Reynolds Metals Company and intended for the Panador sliding door, been shipped to Panaview?

A. Yes, both incomplete and unbalanced shipments have been.

Q. Will you explain what the difference between an incomplete and unbalanced shipment is?

A. An unbalanced shipment is one which, in essence, allows us, or does not allow us to complete a door.

And an incomplete shipment is one, which, in our own terminology, would allow us to make a limited number of doors but not as many as the order called for.

Q. Now, when you have received shipments lacking certain essential extrusions, what is the effect of this upon your production?

A. The effect is that it hampers our production, [186] reduces the efficiency of our operation

(Testimony of Louis Pinson.)
and curtails our ability to ship complete units to
our customers.

Mr. Mahoney: Would you please mark this as
Plaintiff's Exhibit No. 22 for identification?

(The exhibit referred to was marked Plain-
tiff's Exhibit 22 for identification.)

Q. (By Mr. Mahoney): I show you Plaintiff's
Exhibit No. 22 for identification, which is a letter
dated March 30, 1955, directed to Mr. Miles of the
Reynolds Metals Company, and ask you if that is
a true copy of a letter written by you, and obtained
from your files, on or about that date?

A. Yes, this is a copy of the letter sent on or
about that date.

Mr. Mahoney: Would you please mark this as
Plaintiff's Exhibit No. 23?

(The exhibit referred to was marked Plain-
tiff's Exhibit 23 for identification.)

Q. (By Mr. Mahoney): I show you Plaintiff's
Exhibit No. 23 for identification, which is a letter
dated April 13, 1955, directed to the Reynolds
Metals Company at Richmond 18, Virginia, signed
by L. Pinson, and ask you if that is a true copy of
a letter extracted from your files which was for-
warded to the Reynolds Metals Company on or
about that date?

A. That is a true copy. [187]

Q. Now, Mr. Pinson, during the period in which
these letters were written, were you encountering

(Testimony of Louis Pinson.)

a series of difficulties with the shortage of orders and the fact that——

Mr. Mahoney: I will rephrase that.

Q. (By Mr. Mahoney): Mr. Pinson, during the period during which these letters were written had the fact that there were shortages of extrusions in orders delivered by Reynolds hampered your production?

A. Very much so, yes.

Q. And were you, therefore, unable to complete shipments to customers of knocked-down Panador aluminum frame sliding doors?

A. In many instances, yes.

Q. Now, Mr. Pinson, you have previously testified that you have custody of the records of the Panaview Company. Do you also have custody of the financial records of that company?

A. Yes, I do.

Q. And do you supervise the payment of the bills of that company as evidenced by invoices directed to that company by its suppliers?

A. On behalf of Mr. Reznick, yes, I perform that function.

(Whereupon, there was a conference between counsel outside the hearing of the court.) [188]

Mr. Duque: Will you bear with us, your Honor, just a moment, please?

The Court: Yes.

Mr. Mahoney: Your Honor, we have here a sheaf of invoices, together with a statement of Reynolds Metals Company in the sum of \$15,281, to which

(Testimony of Louis Pinson.)

was added a few sums which raised the total to \$15,944. Now, the invoices are scattered throughout the pertinent die charges and indicate that these charges were made to Panaview. And there is evidence by this copy of the check forwarded to Reynolds Metals that these invoices were paid.

Now, to avert burdening the record I have suggested to Mr. Duque that during the recess Mr. Pinson and one of my client's representatives could go over these and stipulate that the die charges were made by these invoices, that the check was presented in payment for the die charges to show performance by the plaintiff of its obligation under this particular purchase order.

The Court: Very well.

Mr. Mahoney: So we will then do this during the recess period.

The Court: Would you prefer to take the recess at this time?

Mr. Mahoney: Yes, that would be fine.

Mr. Duque: It might expedite things, your [189] Honor.

The Court: The court will be in recess, subject to call. You let the clerk know when you are ready to proceed.

(Short recess.)

Mr. Mahoney: Your Honor, the invoices have been reviewed by the representatives of the plaintiff and the defendant, and counsel for the plaintiff and defendant are willing to stipulate that the total sum

(Testimony of Louis Pinson.)

of \$1430 was paid by the plaintiff to the defendant as die charges under the purchase order which incorporated said die charges. Is that correct?

Mr. Duque: That is correct, your Honor; without stipulating as to the nature of those charges.

The Court: In other words, the stipulation is that the plaintiff paid the defendant \$1430 as charges—

Mr. Mahoney: On the dies.

The Court: —in connection with the dies. Is that it? And paid all the charges defendant made. Is that it?

Mr. Duque: Yes, your Honor. The amount that is set forth in the stipulation of facts is the same amount, and we are stipulating that that amount has been paid, without stipulating as to the nature of the charge.

The Court: And those charges were all the charges which the defendant made on account of dies?

Mr. Duque: Yes, your Honor.

The Court: Is that agreed, Mr. Mahoney? [190]

Mr. Mahoney: That is agreed.

Mr. Duque: The defendant is also willing to stipulate that in one of its Panaview files there appears an internal production order dated April 20, 1954, relating to extrusions to be made for the Panaview corporation, the plaintiff here, and that on the bottom of said order there appears the following:

(Testimony of Louis Pinson.)

"4. Sliding doors — these are components parts so be sure and ship all sections at same time."

The defendant is further willing to stipulate that this portion of the production order is an internal portion of the order and does not appear in any documents which are sent to the plaintiff.

Mr. Mahoney: So stipulated.

The Court: Very well.

Q. (By Mr. Mahoney): Mr. Pinson, are you, in your position as assistant secretary and assistant to the general manager of Panaview, familiar with the costs of producing the Panador aluminum sliding door? A. Yes, I am.

Q. And have you recently made a survey of the costs of producing the Panador sliding door?

A. Yes, I have.

Mr. Mahoney: Would you please mark this as Plaintiff's [191] Exhibit No. 24?

(The exhibit referred to was marked Plaintiff's Exhibit No. 24 for identification.)

Q. (By Mr. Mahoney): I show you Plaintiff's Exhibit No. 24 for identification and ask you if this is a compilation of the production costs and the costs of the various materials which are utilized in fabricating the Panador aluminum sliding door?

A. Yes, this is such a compilation. It includes the labor and material costs.

Q. Now, do you have embodied in this cost data

(Testimony of Louis Pinson.)

the total cost for the extrusions as received from Reynolds Metals Company?

A. Yes, I do have.

Q. Where is that cost to be found?

A. That is on the first of the two pages of the document at the top. The extrusions used in the typical or bench-mark doors set up for the purposes of this study are parts Nos. X-1 through X-7, and they are separated from the rest of the component parts, and the total cost of those extrusions follows down a line called or headed "Total Cost."

Q. And the sum total of \$17.80 is the total cost of the raw extrusions as received by Panaview from Reynolds Metals Company?

A. That's correct. [192]

Q. And when you received those extrusions from Reynolds Metals Company are they cut to size or in any way fabricated? A. No.

Q. And in your plant do you cut the extrusions to size, punch the holes, nail the various slots and generally fabricate the same?

A. We perform all the fabrication operations, yes.

Q. Is there a list here of the total cost of the various auxiliary parts which are supplied and applied to the extrusions after you have fabricated the extrusions, preparatory to the installation of these auxiliary parts?

A. Yes. That list begins just under the extrusion list and continues over to the second page.

Q. And what is the total cost of the additional

(Testimony of Louis Pinson.)
components? A. \$8.145.

Q. And where do your labor costs for both punching, drilling, and otherwise manipulating and forming the extrusions and also for making the various installations of the auxiliary in the extrusions prior to shipment appear?

A. Those costs appear as an extended column in the form of "Labor Hours" on page 1, with the cost for each separate extrusion extended on the line that that extrusion cost is placed on. Then at the bottom of the column "Labor Hours" they are totaled and we found that there was a total [193] of .890 labor hours, what we call standard hours, involved in the production of one Panador door.

Q. Now, Mr. Pinson, I note that this "Labor Hours" appears on the first page. Do you have any figure for the installation of the various auxiliary parts such as the rollers and—

A. Well, the standard hours for the installation of all of these parts, all assembly operations, are figured in against the particular extrusion, which is finally assembled.

Q. Now, from this record are you able to determine which involves the greater cost, the installation of the various small auxiliary parts or the various auxiliary parts, or the fabrication of the extrusion after it reaches your plant?

A. Well, from this particular record I could not determine that. But I am well aware of the relative costs between fabrication, primary fabrication and assembly operations.

(Testimony of Louis Pinson.)

Q. How would you define "primary fabrication"?

A. Primary fabrication is the preparation of the extruded part for all of the assembly operations which go into it.

Q. And the "assembly operation," how would you define that?

A. The assembly operations are bench operations [194] which involve the insertion or attachment of small parts to the basic extrusion.

Q. And what percentage of the labor cost, from your experience, is allotted to the primary operations?

A. From my experience, the percentage would be at least 80 per cent.

Q. And, therefore, only 20 per cent of the labor operations is devoted to the installation of such auxiliary parts as bumpers, rollers and the like?

A. At a maximum of 20 per cent, yes.

The Court: 20 per cent on a given door would be the figure you gave us?

The Witness: Yes.

The Court: Some eight-tenths of an hour?

The Witness: Actually, about nine-tenths of an hour, and 20 per cent of that would be represented by sub-assembly operations.

The Court: So is it fair to assume then from the time you receive the extrusions from Reynolds until the time you have the knocked-down door assembled ready for shipment that some five hours of labor is expended on it?

(Testimony of Louis Pinson.)

The Witness: Oh, no, your Honor. I am sorry. Only nine-tenths of an hour, a shade under nine-tenths of an hour is expended on each individual door.

In other words, this represents the entire amount of [195] labor which has gone into the fabrication and sub-assembly involved in the door. 20 per cent of this nine-tenths of an hour is represented by the sub-assembly.

The Court: Yes. I understand it now.

Q. (By Mr. Mahoney): In other words, it would take approximately 10 to 12 minutes to install the various auxiliary components?

A. That would be about right.

Q. Once the extrusions have been punched and otherwise manipulated in the plant? A. Yes.

Q. Now, you have a figure here in the column which says "At 100% Standard" of 1.42, and another column which says "(50 Door Run) at 60% Standard" a figure of 2.36. What does that mean?

A. Well, let me explain that the period covered by this analysis is during the period of the fall of 1954. Our average wage in the Panador division at that time was \$1.59 per hour. The nine-tenths of an hour, or the .890 of an hour at \$1.59 would represent a cost of \$1.42.

Q. By "cost," you mean labor cost?

A. Labor cost, providing that we were operating at 100 per cent of standard.

While this operation is greatly to be desired, if we found our efficiency in any way impaired we

(Testimony of Louis Pinson.)

would not be [196] able to make it, and we found that in the real truth of the matter our production more nearly averaged 60 per cent of standard, which meant that we found our cost was \$2.36 labor cost per door.

Q. In your experience is it common to run a plant with 100 per cent efficiency as far as labor costs are concerned?

A. No. It is virtually unknown unless you have what is called an incentive plan to stimulate the workers to try to better the standard.

Q. Does the 60 per cent of standard indicate an inefficient operation?

A. No. It is a pretty fair efficient operation. And we felt that, considering the supply difficulties that we had during the course of this run, it was quite good.

Q. Now, did you have any further costs on packaging or shipping of the door?

A. Yes. We had an additional labor cost of 37 cents for the packaging. This was based on our own experience. It was not applied on the standard hour basis.

Q. And where is the cost of the cartons set forth?

A. The cost of the carton is set forth under the list of components along with other components of the finished package, such as the cloth bag and the paper bag which we use. [197]

Q. Now, where have you totaled the entire cost

(Testimony of Louis Pinson.)

to Panaview Door & Window Co. of a Panador aluminum sliding door?

A. Well, first, let me say we have totaled the cost of the components, including the extrusions, under the "total cost" column where you will find the figure of \$25.94.

Extended to the right three columns over you will find a cost of \$27.73, which would represent our cost at 100 per cent of standard. Two columns farther over to the right you will find the cost figure of \$28.67 $\frac{1}{2}$, which represents our total cost per Panador at 60 per cent of standard.

Q. Now, when you speak of the production of the Panador, and you refer to the figures indicated in this exhibit entitled "Panador Cost Data," does this represent the entire run of Panadors? Or have you made a selection of typical Panadors?

A. This represents a typical run. We regard an efficient or an economic run of 50 doors as being desirable. And this represents a 50-door run, and is based in truth upon actual plant experience over this period of time.

Q. What period of time is that again?

A. The fall of 1954.

Q. And does this cost data cover all sizes of the Panador?

A. No. For the purpose of establishing a standard, [198] and rather than having a large number of figures, we felt that since the very substantial majority of the doors sold by us were in the 8.0 x 6.10 size that it would very well average out

(Testimony of Louis Pinson.)

by using the 8.0 x 6.10 size as our standard or bench-mark in order to establish our basic unit cost.

Q. Now, Mr. Pinson, have you been able to determine from your records the number of, or, the total sales volume of Panador business from the time at which you began business in 1954 through December, '54, and in 1955 from January through June, inclusive? A. Yes, I have.

Q. Have you consulted, or had an employee consult records of the corporation to determine the figures in that regard?

A. Yes. I gave this as a project to the book-keeping department.

Mr. Mahoney: Would you please mark this document as Plaintiff's Exhibit No. 25?

(The exhibit referred to was marked Plaintiff's Exhibit 25 for identification.)

Q. (By Mr. Mahoney): I show you Plaintiff's Exhibit No. 25 for identification and ask you if this is a true summary, made under your supervision, of the total sales figure of the Panador Aluminum frame sliding door?

A. Yes, this is a summary. It is addressed to me [199] in the form of a memorandum from the girl who actually performed the operation. It is a summary only. We have detail to support it.

Q. Mr. Pinson, during the period extending from the initiation of the sale of the Panador in 1954, up and through June 30, 1955, could your

(Testimony of Louis Pinson.)

company have manufactured additional Panadors if there were sales for the Panador?

Mr. Duque: To which question I object on the grounds that it is incompetent, irrelevant and immaterial; doesn't tend to prove any issue in this case. It is conjectural, speculative and remote.

Mr. Mahoney: Your Honor, we are trying to prove by the answer that the company, the Panaview corporation, had available to it facilities which would have enabled it to produce larger numbers of doors if the sales for such doors had been available to it.

The Court: Well, why not go at it this way: Ask him what they were producing and ask him what the capacity was at the time. And then we can perform the mathematics in argument.

Q. (By Mr. Mahoney): Mr. Pinson, in your recent consideration of the records of the corporation have you determined the approximate number of doors which were produced in the period from January, 1955, through June 30, 1955?

A. Yes, I have. Not approximate. We have determined [200] exactly the number of doors were produced.

Q. Can you recall what that number was?

A. I don't have it here in front of me. But it was between 4125 and 4150 units.

Q. And could your company have produced a larger number than 4150 units during that period of time?

Mr. Duque: To which question I object on the

(Testimony of Louis Pinson.)

grounds that it is incompetent, irrelevant and immaterial as to what they could have produced during that period of time. There is no issue here—there has been no connection shown between what they can produce and what we had to do with it.

The Court: It is an element of the proof of damage.

Why don't you ask him what the capacity of the plant was during this period?

Q. (By Mr. Mahoney): What was the capacity of the plant of the Panaview Door & Window Co. which was allotted, and can be allotted to the production of the Panador, and could have been allotted to the Panador during the period mentioned?

A. Our plant capacity was based upon our tooling and our labor force and was approximately 1500 units per month, slightly more than double our 700 units per months of actual production during this period of time.

Mr. Mahoney: I now introduce into evidence Plaintiff's Exhibits 22 through 25. [201]

Mr. Duque: You mean you offer them?

Mr. Mahoney: Yes.

Mr. Duque: I object to them, your Honor, on the grounds that they are not the best evidence. They are incomplete, and they do not show the true condition of the records of the Panaview company, the plaintiff in this action.

The Court: Well, in what respect is the foundation lacking. Foundation records are available for—

(Testimony of Louis Pinson.)

Mr. Mahoney: The records are available.

The Court: ——Exhibit 24 and Exhibit 25 for identification, if you wish to see them.

Is that the ground of your objection, that the supporting data has not been produced?

Mr. Duque: That's correct, your Honor. I never saw this before in my life. It could be correct, and it could not be. But——

The Court: Are the supporting data available?

Mr. Mahoney: Yes, your Honor, the supporting data are available.

The Court: Are they in court?

Mr. Mahoney: No, they are not in court.

Q. (By Mr. Mahoney): Mr. Pinson, could you produce the supporting data for this summary?

A. Yes, I could.

May I explain, your Honor, that the supporting data for [202] the summary of our cost is voluminous to say the least. I can produce it. It is based on inventory cost data, item 1, and item 2, it is based upon, also, upon time standard studies which were conducted and performed in our plant, all of the material which I have in my possession.

The Court: Let's see Exhibits 22, 23, 24, and 25,
Mr. Clerk.

(Whereupon the documents were handed to
the court.)

The Court: Exhibit 22 appears to be a carbon copy of a letter dated March 30, 1955, by L. Pinson to Mr. Miles of the Reynolds Metals Company. Pre-

(Testimony of Louis Pinson.)

sumably, if the letter was sent, your client has the original. Mr. Duque.

Is there any objection to that upon the ground that it is not the best evidence?

Mr. Duque: Your Honor, I have forgotten even what that letter is.

The Court: Mr. Clerk, will you show it to counsel?

(Whereupon the document was handed to counsel.)

The Court: Exhibit 23—

Mr. Duque: Oh, no, your Honor. I have no objection to that.

The Court: Very well. Exhibit 22 for identification is received in evidence.

(The exhibit referred to, marked Plaintiff's Exhibit 22, was received in evidence.) [203]

The Court: Exhibit 23 appears to be, in like manner, a copy of a letter addressed, under date of April 13, 1955, by Mr. Pinson to the attention of T. G. Redford, Assistant Credit Manager of the Reynolds Metals Company. Is there objection to that letter?

Mr. Duque: I am sorry, your Honor.

The Court: That is the same type of situation, Exhibit 23 for identification.

Mr. Duque: Yes, your Honor. I have objected to this. I think, on the ground that it is immaterial, and I renew that objection. I have no objection to its authenticity.

(Testimony of Louis Pinson.)

The Court: The objection is overruled. Exhibit 23 for identification is received in evidence.

(The exhibit referred to was marked Plaintiff's Exhibit 23 and received in evidence.)

The Court: That leaves the objections to Exhibits 24 and 25 for identification, which at the present must be sustained until a better foundation is laid.

Mr. Mahoney: Does Mr. Duque desire that we place in evidence all of these voluminous records? Or does he desire that an accountant——

Mr. Duque: I have no desire to burden you with bringing them all into court here if the records can be made available to somebody from Reynolds and he can look at them and try to verify some of these figures. [204]

The Court: Are there any further questions of Mr. Pinson at this time?

Mr. Mahoney: We have one further line of questioning with Mr. Pinson.

Q. (By Mr. Mahoney): Mr. Pinson, have you recently investigated the average price at which the plaintiff has sold Panador aluminum sliding doors during the period from its initiation of its operations in 1954 to, and including, June, 1955?

A. Yes, I have.

Q. And have you derived an average figure for the total sales volume of the Panador aluminum frame sliding door?

(Testimony of Louis Pinson.)

A. Yes, I have. Again I do not have that figure here before me, but it is in the neighborhood of \$62 or \$63.

Mr. Duque: Now, just a moment. Before you start naming any figure, may I interpose my objection? I object to this on the ground that it is not the best evidence. It is conjectural. He doesn't have any figures before him in the courtroom. And he is talking about an approximate figure.

Mr. Mahoney: Well, we will produce, for the benefit of Mr. Duque, all of the records pertaining to costs and sales price.

The Court: Anything further from this witness?

Mr. Mahoney: No, your Honor. [205]

The Court: Any cross-examination?

Mr. Duque: Just one question, your Honor.

The Court: I was going to suggest that some representative of the defendant go with the witness wherever these records are and examine them this evening, and it can be done.

Mr. Mahoney: That would expedite the action, your Honor.

The Court: And you may wish to defer your cross-examination.

Mr. Duque: Well, the only cross-examination I was going to ask him about was with regard to the correspondence at this time, your Honor. But I can defer that until he gets back.

The Court: It might be better to send him on if he can go now, some representative of the defendant, and make this examination.

(Testimony of Louis Pinson.)

Mr. Duque: Very well, your Honor.

The Court: Can you take some representative of the defendant now?

The Witness: Yes, your Honor. May I say that I believe I have supporting data for that memorandum—

The Court: Of course, your problem, I take it, is to satisfy whoever represents the defendant in this matter, and if he is satisfied, whatever it takes to satisfy the defendant's representative will be the answer. It may be much or it may be little. So you may step down and embark upon that [206] undertaking, if you will.

The Witness: Thank you.

(Witness excused.)

Mr. Mahoney: Would you like to delegate—

Mr. Duque: Mr. Hairston will be happy to accompany Mr. Pinson to wherever the records are.

The Court: It may be that Mr. Pinson might have the answer in his briefcase. But these gentlemen can work it out, I am sure.

Mr. Duque: Mr. Hairston is the comptroller of the Phoenix plant. And if the court will excuse him from testifying this afternoon—

The Court: Yes.

Mr. Duque: —he will be back in the morning.

May I explain to Mr. Hairston what the problem is, your Honor?

The Court: Yes, if you will.

Mr. Mahoney: Would the court like to declare a recess while this is going on?

The Court: Do you wish a recess?

Mr. Mahoney: No, your Honor.

The Court: The plaintiff's next witness?

Mr. Mahoney: One moment, your Honor.

Your Honor, the plaintiff will rest here, subject to laying a foundation for the testimony of the witness, Pinson, [207] as to Exhibits 24 and 25, and as to the sales figure.

The Court: Very well. And as to the average sales price. So the objections to those three items at this time will be sustained with the privilege of the plaintiff to reopen the case in chief to supply the foundation.

Mr. Duque: At this time, your Honor, the defendant moves for an involuntary dismissal of this action under Rule 41(b), without waiving its right to offer evidence in the event the motion is not granted.

The motion is made upon the ground that upon the facts and the law the plaintiff has shown no right to relief in the within cause. This action, your Honor, as set forth in the complaint is an action containing three causes of action. The first cause of action is for an alleged breach of contract. And the complaint alleges that there was a contract whereby the defendant agreed to use the dies which it made for the production of plaintiff's extrusions for the Panador exclusively for the plaintiff, and for no other person. And they rely upon paragraph

11 of the Acknowledgment, which is in evidence in this action as Exhibit 5, Plaintiff's Exhibit 5.

We have heretofore filed with your Honor a memorandum regarding that Acknowledgment, and it is quite apparent to me, and I assume that it must be quite apparent to your Honor, that the Acknowledgment is not a contract to make [208] dies or to produce extrusions exclusively for the plaintiff. It is an Acknowledgment which simply says that if any dies, jigs or other equipment are made specifically and solely for the plaintiff's use, then and in that event such dies, jigs and other equipment will remain the property of the defendant and will be under defendant's sole and exclusive control and possession. That is all it says. It does not say under any circumstances that we will only use the dies for the production of extrusions or extruded shapes for plaintiff. Nowhere in paragraph 11 can that be seen.

The evidence in this case, on plaintiff's evidence, further shows why that must be true. There is in the record in this case another memorandum or an acknowledgment which was used in 1951, and that does say in precise language, your Honor, that the dies which are made for the customer will be used only to produce extrusions for the customer. That was changed, and between the time of 1951 and 1955, or 1954 there was a completely different agreement, Reynolds had prepared a completely different acknowledgment with relation to the production of extrusions.

If your Honor will read the one, it is precise

and explicit, which indicates that certainly Reynolds Metals knows how to prepare an acknowledgement, which says that when they produce dies they will be for the exclusive use of one customer. [209]

The Court: Where is the old form, the 1951 form?

Mr. Duque: The 1951 form, your Honor?

The Court: Is it in evidence here?

Mr. Lydick: Exhibit No. 5, your Honor.

The Court: May I see it, Mr. Clerk?

(Whereupon the document was handed to the court.)

Mr. Duque: The old form, your Honor, is Exhibit 2. Rather, the 1954 form is Exhibit 2.

The Court: The 1954 form is set forth in the complaint, is it not?

Mr. Duque: That is correct, your Honor.

The Court: In paragraph—I had it here a moment ago—paragraph 3, the first cause of action.

Mr. Duque: That's correct, your Honor.

The Court: Now, I have before me paragraph 5. Where does that appear? I mean I have Exhibit 5. Is it paragraph 11? It is paragraph 12.

Mr. Duque: It is paragraph 12, your Honor, in Exhibit 5, which is the same as paragraph 11 in Exhibit 2.

The Court: The first sentence appears to be substantially the same in both paragraph 12 of Exhibit 5 and paragraph 11 of Exhibit 2. The first sentence of paragraph 12, Exhibit 5, rather, appears to comprise the same expressions as are comprised

within the first two sentences of paragraph 11 of Exhibit 2. [210]

You contend that the crucial sentence which is omitted from paragraph 11 of Exhibit 2 is the third sentence, or the second sentence of paragraph 12 of Exhibit 5 which reads that:

"* * * all such equipment shall be used exclusively for the manufacture of products for buyer"?

Mr. Duque: That's correct, your Honor. That is entirely absent from the acknowledgment upon which the plaintiff relies in this action as being a contract for the exclusive use of these dies.

Paragraph 11 of Exhibit 2 has no indication, no statement, nothing in it whatsoever that we will use the dies exclusively for extrusions to be made for the plaintiff; while Exhibit 5, paragraph 12, specifically states it.

So it must be apparent, not only from the reading of paragraph 11, if your Honor please, but from the comparative reading with paragraph 12 of Exhibit 5 that a change took place in that period of time.

The Court: I have that point.

Mr. Duque: Very well. So I submit, your Honor, that there is no contract for the exclusive use of the dies existing between this plaintiff and this defendant.

I further submit that even if there had been a contract, and even if your Honor were to interpret

paragraph 11 of Exhibit 2 as being an exclusive use contract, there still can [211] be no damage accruing to these plaintiffs for the reason that the evidence shows here that the identical door that they were producing for Windsor was taken by Windsor to Reynolds, and the identical extrusions were made by Reynolds. That door was in the open market. It had been sold by Windsor to Fuller for some period of time. It was in the public domain. There was no patent right to it. There was no property right in it. Anybody, whether it be Windsor, A Corporation, B Corporation, could have taken the Panador, which was supposed to have all these secret and unique features to it, taken that door, broken it down, reproduced it and there would have been no conceivable cause for damage to the person that did it.

So, even assuming that your Honor does interpret this paragraph 11 as a contract for exclusive use, which I submit it cannot be, but even for the purpose of the argument, if it were to be tortured into that kind of an interpretation, what conceivable damage has the plaintiff in this action suffered by reason of the acts of the defendant in its alleged breach of contract? It is injury without damage, your Honor. I mean, it could have been done by anybody. And I am not talking about the breach of contract only.

Assuming for the purpose of the argument that there was a contract for exclusive use, and assuming that we breached a contract and made dies and produced extrusions out of the [212] same dies for

Mr. A, Corporation A, or Corporation B, anybody in the trade, anybody in the business could have done the same thing because that door was out on sale; it was being sold by Panaview to Windsor, who in turn sold it to Fuller. And Windsor was producing the door for Fuller. So it is in the public domain. There is no patent. There is no copyright. There can be no injury.

Now, to pass on to the second cause of action. They allege a breach of trust and confidence, of a confidential relationship. I ask your Honor to scan the record in this case to find one bit of evidence which shows any conceivable relationship of trust or confidence. The only thing that was done, the only testimony there is in this record is the testimony of Mr. Grossman that he met with Mr. Sargeant and he told Mr. Sargeant that they were going to come out with a new door and didn't want their competitors to know about this new door that they were bringing out, and would Mr. Sargeant please not tell the competitors.

He also says that he told that to Mr. Kavich. There isn't a word of testimony in the record about any agreement between Panaview and Reynolds Metals as to the exclusive, secret, unique character of this door; nor is there anything in the record that we have ever disclosed that to anyone. There is no evidence in this record that we have ever breached any trust or breached any confidence or have shown any [213] drawings or shown to Windsor any drawings or extrusions or anything else that we were not supposed to have shown. The only

trust and confidence, supposedly, in this entire record is what when they thought they were going to bring out the Panador they didn't want their creditors to know about it so they said to Mr. Sargeant and they said to Mr. Kavich, "Look, we are bringing out this new door. We think it's a fine door and we think it's competitive and sells for less * * *" and so on and so forth. "Would you please not tell any of our competitors about it so we can bring it out on the market without them knowing about it."

That is the only conceivable theory, judging from the evidence that has been produced here, upon which plaintiff can rely. And there is no evidence that that has ever been breached. Nobody has here testified, nor can they ever testify, that Mr. Sargeant went out and told the competitors of Panaview that they were coming out with a new door and that it was going to have this and it was going to have that feature and was going to have a—going to be lighter and cheaper and so forth and so on. There is no evidence of that any place in the record, your Honor.

The plaintiff has failed to produce, first, any relationship of trust and confidence between the parties; and second, any breach of the relationship of trust and confidence. As your Honor knows, and as the cases which we cite in our [214] memorandum show, you can't establish a relationship of trust and confidence just by saying, "I establish with you a relationship of trust and confidence." I mean, that isn't what the law says. You have to have a factual situation arise whereby the court can determine

from the facts that one person relied, trusted and had faith in another person and that the other person breached that faith.

Now, I say——

The Court: Well, is that all there is to it? Must not the person in whom the trust is reposed know that the trust is being reposed in him?

Mr. Duque: He must know that the trust is being reposed upon him, or in him; and knowing that he must, with that knowledge, go out and breach that confidence or breach that faith or breach that trust.

There has been talk in this courtroom about fraud, about all sorts of things that were supposed to have been done by Reynolds Metals Company. But insofar as factual concrete evidence is concerned, if the court please, there is not one bit of evidence that Reynolds Metals has done anything in this case that it was not supposed to do or that it was not required to do in its business. It deals with many customers. It makes extruded parts for many customers. It can't favor one customer over another. It didn't know if Mr. Grossman had a feeling inside of his heart that he was [215] reposing trust and confidence in somebody. Mr. Sargeant couldn't guess that. And there is no evidence that Mr. Sargeant did guess it or that he ever breached it.

So I submit that the cause of action with regard to the breach of trust and confidence, your Honor, is completely without any evidence to support it.

To pass to the third cause of action, the unfair

competition, I won't dwell on that long because insofar as the evidence in this case is concerned there is absolutely no evidence of unfair competition as that term is defined in the cases.

There is no evidence of any palming off; there is no evidence of any secondary meaning having been acquired. There is nothing in this record that shows any unfair competition, or in fact any competition. The witness that was called by the plaintiff from the Windsor Supply Company verified that point completely. He testified, and there has been nothing contrary in the record, that at no time, so far as he knew, did the Windsor Supply Company, or the Windsor Manufacturing Company ever receive any knocked-down manufactured doors ready for sale to the public from Reynolds Metals. We have never competed with them. The Reynolds Metals Company hasn't been in that field. And that is the fact. And if called upon to put on a case we will prove without any question of a doubt that that is [216] the fact.

So to say that the Reynolds Metals Company is in the business of producing assembled knocked-down doors for resale to the public is just false. It isn't true. So we are not in competition. We have never been in competition. Our parts division did sell to Windsor Manufacturing Company and to Windsor Supply milled extruded shapes, which shapes were taken by Windsor in bundles, matched, put together, the component parts were added to them, a knocked-down door was assembled, put in a package and sold to the public under the Wind-

sor label, and it was the same door as the Panador. Their lawsuit is against Windsor and not against Reynolds Metals Company. We haven't done anything to compete with them or create any unfair competition in this field. And I submit on the third cause of action, your Honor, there must be a dismissal because there is no evidence which could possibly support it.

In summary I submit, your Honor, that there is no contract. We admit the acknowledgment. We have admitted it in our affidavits.

The Court: Mr. Duque, I don't like to cut you short here, but——

Mr. Duque: Well, I am about finished.

The Court: I heard your motion. The plaintiff hasn't rested. He rested only subject to condition with respect to Exhibits 24 and 25 for identification, and also with respect [217] to the average sales price.

So I couldn't rule on the motion, strictly speaking, and the motion wouldn't properly lie, until plaintiff has rested.

And, in the second place, on this motion the court must not only take the evidence most favorable to the plaintiff, but must indulge every presumption within the bounds of reasonableness in addition and in favor of the plaintiff's case.

Mr. Duque: I appreciate that, your Honor.

The Court: It seems to me that I should deny the motion when it's right for that ruling, and hear the evidence on the other side.

Mr. Duque: Very well, your Honor.

The Court: And I make that suggestion now in the interest of time.

Mr. Duque: Very well, your Honor. We will proceed.

The Court: Do you wish a recess before calling your first witness?

Mr. Duque: No, not unless your honor or counsel wishes one. And the reporter. I think the reporter probably wishes it more than any of us.

The Court: We will take a five-minute recess.

(Short recess.)

Mr. Duque: May I proceed, your Honor?

The Court: Yes. The pending motions for dismissal will [218] be denied.

Mr. Duque: Now, some mention was made, your Honor, earlier in the trial as to the use of the affidavits to expedite the trial and the testimony.

The Court: Yes. Before you proceed, may it be stipulated, gentlemen, that the defendant's motion for dismissal be deemed made upon the close of the plaintiff's case in chief and denied?

Mr. Mahoney: So stipulated.

The Court: Without the necessity of repeating it when the plaintiff does formally close its case.

Mr. Duque: So stipulated.

The Court: Very well. It will be so ordered.

Mr. Duque: Now, your Honor, some mention was made early in the trial as to the use of the affidavits which were filed in connection with the

motion for preliminary injunction, for the purpose of expediting the testimony.

Does your Honor believe it would expedite the presentation of the defendant's case if I offered the affidavit of each deponent in evidence and, after a few preliminary questions, turn the witness over to the plaintiff for cross-examination? Or would it be your Honor's wish that I take the witness right down through the testimony?

The Court: I think it will save time, pursuant to stipulation, just to offer the affidavit pro tanto as the direct [219] testimony. If you will offer each affidavit now that you intend to offer for that purpose, then that will give the plaintiff an opportunity to prepare cross-examination.

Mr. Duque: Very well. I will offer—

The Court: Maybe the plaintiff is prepared now.

Mr. Mahoney: I think we will need a little preparation on some of them. It depends on which ones he offers.

The Court: Very well. Do you wish to proceed, Mr. Duque?

Mr. Duque: Yes, your Honor.

I offer first the affidavit of Frank K. Miles.

The Court: Frank K. Miles?

Mr. Duque: Yes, your Honor.

The Court: When was it filed?

Mr. Duque: His affidavit was filed on—

The Court: September 14th?

Mr. Duque: September 14, 1955.

The Court: The affidavit of Frank K. Miles will be received—

Mr. Mahoney: Your Honor, that offer is objected to on the ground that the matters contained therein are immaterial and irrelevant and relate to financial dealings between Glide Windows, Inc., and the defendant corporation, and financial dealings with Panaview Door & Window Co. and defendant corporation, which are not relevant here in any way whatsoever. [220] It has already been stipulated that the contract which was constituted by the purchase order involving the dies was fully performed, and collateral debts or collateral financial negotiations between either Glide Window or Panaview Door & Window Co. and the defendant here are not in any way relevant or material.

The Court: The affidavit is received in evidence. The objection is overruled. The affidavit is received as Exhibit A, as, pro tanto, the direct examination of the witness Frank K. Miles.

(The affidavit referred to, marked Defendant's Exhibit A, was received in evidence.)

DEFENDANT'S EXHIBIT A

[Defendant's Exhibit A is set out in full, pages 12 to 16 of this printed record.]

The Court: Do you wish to ask anything further of Mr. Miles?

Mr. Duque: Yes, your Honor, there is one matter that I wish to ask Mr. Miles.

The Court: Before you do that, don't you think it might be helpful for you to offer each affidavit that you intend to offer, so that the plaintiff will know and will be advised?

Mr. Duque: Very well.

Your Honor, I also offer the affidavit of Mr. James M. Hairston, which was filed in this court on September 15th. But since—and this statement will apply to all of the affidavits—there has been no issue raised or no evidence produced on the part of the plaintiff as to the custom and usage in [221] the trade; in other words, they have offered no evidence in support of the allegations of their complaint that custom and usage in the trade was broken or was violated by the defendant, we do not wish to raise the issue at this time, your Honor, because there is no evidence to support the allegation of the complaint.

So in all of the affidavits that I offer, or in any of them, any testimony with regard to the custom and usage in the trade, I would not offer and would not care to have a part of the record at this time.

The Court: Very well. Then, with that understanding, the affidavit of James M. Hairston is received as Defendant's Exhibit B, as, pro tanto, the direct examination, the direct testimony of James M. Hairston.

(The affidavit referred to, marked Defendant's Exhibit B, was received in evidence.)

DEFENDANT'S EXHIBIT B

[Defendant's Exhibit B is set out in full, pages 29 to 34 of this printed record.]

Mr. Duque: I next offer the affidavit of Harry M. Sargeant which was filed in this court on September 17, 1955, excluding that portion thereof, if any, which relates to custom and usage in the industry.

The Court: It will be received as Defendant's Exhibit C, pursuant to the stipulation.

(The affidavit referred to, marked Defendant's Exhibit C, was received in evidence.)

DEFENDANT'S EXHIBIT C

[Defendant's Exhibit C is set out in full, pages 17 to 21 of this printed record.]

Mr. Duque: I next offer the affidavit of O. J. Meyer, Jr., [222] which was filed in this court on September 15, 1955, excluding any statement as to custom and usage in the industry.

The Court: It will be received, pursuant to the stipulation, as Defendant's Exhibit D.

(The affidavit referred to, marked Defendant's Exhibit D, was received in evidence.)

DEFENDANT'S EXHIBIT D

[Defendant's Exhibit D is set out in full, pages 34 to 38 of this printed record.]

Mr. Duque: And I offer in evidence the affidavit of William Yates—

The Court: William O. Yates?

Mr. Duque: William O. Yates, your Honor.

The Court: Filed September 15, 1955?

Mr. Duque: Yes, your Honor.

The Court: It may be received, pursuant to the stipulation, as Defendant's Exhibit E.

(The affidavit referred to, marked Defendant's Exhibit E, was received in evidence.)

DEFENDANT'S EXHIBIT E

[Defendant's Exhibit E is set out in full, pages 22 to 28 of this printed record.]

The Court: Does that conclude the list?

Mr. Duque: That concludes the list at this time as a part of the defendant's defense.

There is another affidavit, of Mr. Robert Milton Beck who is out here from the East, and if the issue of custom and usage is to be raised in rebuttal—I don't see how it could at this stage of the proceedings—but Mr. Beck's affidavit relates to the custom and use in the trade. I would like

permission to put him on or put his affidavit into evidence [223] and have the plaintiff cross-examine him, if they wish to, at this time so that he may go back home.

The Court: Well, as I understand, the plaintiff is not raising any issue as to custom and usage.

Mr. Mahoney: Your Honor, there was a pleading as to the custom in the trade of disclosures made to extruders. And there was also in these affidavits a contention that there was a custom that the dies could be used freely. So there were two different customs pleaded and alleged, referred to here.

The Court: But the plaintiff is not raising that issue?

Mr. Mahoney: We are not raising that issue here.

Mr. Duque: In other words, there will be no issue raised as to custom and usage in the industry, either as to the use of dies or as to the use of confidential or trade information?

Mr. Mahoney: That is correct.

Mr. Duque: Then under those circumstances I will not offer the affidavit of Mr. Beck.

The Court: Very well.

Mr. Duque: May I proceed to call Mr. Miles, your Honor?

The Court: Yes, you may.

Mr. Duque: Mr. Miles, will you step forward, please, sir. [224]

FRANK K. MILES

called as a witness on behalf of the defendant, being first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Frank K. Miles.

Direct Examination

By Mr. Duque:

Q. Mr. Miles, what is your capacity with Reynolds Metals Company?

A. Regional credit manager.

Q. Now, Mr. Miles—

The Court: Do you wish the affidavit before the witness, Exhibit A?

Mr. Duque: Yes, your Honor.

The Court: Mr. Clerk, will you place Exhibit A before the witness?

(The document was placed before the witness.)

Mr. Duque: Mr. Clerk, may I please have Exhibits 22 and 23?

(The documents were handed to counsel.)

Q. (By Mr. Duque): Mr. Miles, I show you Exhibit 22, Plaintiff's Exhibit 22, and Plaintiff's Exhibit 23, and ask you if you have ever seen the originals of those letters?

A. I saw 22. That was addressed to me.

(Testimony of Frank K. Miles.)

I saw a copy of 23. [225]

Q. Did you reply to Exhibit 22?

A. Yes, sir.

Q. Now, I show you a copy of a letter dated April 6, 1955, addressed to Mr. L. Pinson, general manager, and apparently written by F. K. Miles, and ask you whether you have ever seen the original of that letter? A. Yes, sir.

Q. Will you tell us what was done with the original of that letter, please, sir?

A. It was sent to Mr. Pinson.

Mr. Duque: At this time, if the court please, we offer a copy of this letter, which has been shown to the plaintiff's counsel, in evidence as the defendant's next exhibit in order.

The Court: Is there an objection?

Mr. Mahoney: No objection.

The Court: That would be Defendant's Exhibit F, Mr. Clerk?

The Clerk: F, your Honor.

The Court: It may be received in evidence.

Mr. Duque: Thank you.

(The document referred to, marked Defendant's Exhibit F, was received in evidence.)

(Testimony of Frank K. Miles.)

DEFENDANT'S EXHIBIT F

(Copy)

Reynolds Metals Company
General Offices: Richmond, Virginia

April 6, 1955.

Mr. L. Pinson, General Manager,
Panaview Door and Window Company,
13434 Raymer Street,
North Hollywood, California.

Dear Mr. Pinson:

Please pardon the delay in answering your letter of March 30th which advised us that because we had not shipped material in balanced loads, we had worked a great hardship on you, and that you would be unable to recognize our invoices until after completion of the order.

After checking this very thoroughly, I find that on March 4th, your Mr. Norm Bowker, who I understand is your assistant, requested that we ship any items which were ready, as soon as possible. When we originally entered this order, we stated it was for component parts and must be shipped at one time or in equal portions. This would have been done except for the fact that we were authorized to ship as we did.

We must, therefore, request that our invoices be honored in accordance with the terms as shown. I

(Testimony of Frank K. Miles.)

am, however, requesting that in the future Mr. Kavich, salesman handling your account, not to authorize shipments of a portion without first receiving your written approval.

Yours very truly,

F. K. MILES,

Regional Credit Manager.

cc: A. R. Kavich, Los Angeles;

A. W. Herthel, Richmond;

T. J. Walsh, Los Angeles;

File.

FKM:jp.

Received in evidence November 22, 1955.

Q. (By Mr. Duque): Mr. Miles, you have read your affidavit which has been received in evidence in this case, have you not? [226]

A. Yes, sir.

Q. Have there been any credit or financial developments which have occurred since the date you made this affidavit, as relates to either Glide Window or Panaview Company?

A. The amount owing is changed. They have paid all, but I think it is, \$2,000 on Glide. I think Panaview has been paid in full. That was paid early this month, I believe.

Q. And there is still a balance due on the Glide account of \$2,000? A. Yes.

(Testimony of Frank K. Miles.)

Mr. Duque: With the introduction of that affidavit and that supplementary testimony, I have no further questions of the witness, your Honor.

The Court: Very well.

Mr. Mahoney: May I have the letter, Plaintiff's Exhibit F?

(The document was handed to counsel.)

Cross-Examination

By Mr. Mahoney:

Q. Mr. Miles, during the period involved, at the time when you replied to Mr. L. Pinson in your letter of April 6, 1955, regarding the failure to ship materials in balanced loads, was Reynolds Metals Company supplying extrusions to [227] Windsor Supply Company?

A. I am sorry. I don't understand. I don't understand the question.

Q. During the period involved at the time in which this series of correspondence was engaged in, Mr. Pinson wrote you a letter—

A. March and April. Yes.

Q. March and April? A. Yes.

Q. And you are familiar with the tenor of that correspondence?

A. As it pertains to credit, yes.

Q. Now, he wrote you regarding shipments, though, didn't he? A. Yes, sir.

Q. And you replied in regard to shipments, didn't you? A. Yes, sir.

(Testimony of Frank K. Miles.)

Q. You didn't say anything about credit?

A. Yes.

Q. Is that correct?

A. I did mention about it because the question of payment was involved. That was the only reason that I entered into the shipment part.

Q. Can you find in this letter a statement in which you justified your failure to ship because of failure of the [228] plaintiff to pay at any time an invoice presented to plaintiff by defendant?

A. There is nothing in this letter that—about nonpayment of—or nonshipment. This was pertaining to the fact that Mr. Pinson and Mr. Reznick had complained that we did not ship in balanced shipments as they had requested. This letter simply stated that we had shipped, at their request, material that was ready.

Q. Now, why weren't you able to ship balanced shipments? A. Originally?

Q. At the time these letters were written.

A. It wasn't at this time that the shipment was—that we were talking about. It was before that. And the main reason this was delayed was because of credit reasons.

Q. Had you not O.K.'d the purchase order on the credit on this order in March or February, 1955? A. Yes.

Q. And wasn't there an understanding between your company and Mr. Reznick of Panaview Door & Window Co. that you would not present the statement for purchase order until you had completed

(Testimony of Frank K. Miles.)

the order, because unbalanced and incomplete shipments prevented them from fabricating the doors and therefore they could not ship them and therefore they could not pay? [229]

A. Well, I assume you mean that we agreed not to expect payment. He said "invoice," I believe.

The Court: This matter of paying the bill, as I see it, doesn't have a thing to do with the case. As far as I am concerned, it doesn't matter if this plaintiff owes them any number of thousands of dollars and any number of months overdue.

Mr. Mahoney: That is exactly the way we feel about it, your Honor, and we don't think that the testimony in the affidavit regarding moneys is in any way relevant. And we previously stated that.

The Court: You are correct. The only reason I admitted it was because of the stipulation to receive the affidavit as part of the direct testimony.

Mr. Mahoney: Because, I think, the purpose here, your Honor——

The Court: The financial dealings, that's ancient history. If the defendant overextended credit, that's another story. It has nothing to do with this case, as I see it.

Q. (By Mr. Mahoney): Mr. Miles, did you handle the credit for Windsor Supply Company during this period of time? A. Yes, sir.

Q. And you had extended credit to Windsor Supply? A. Yes.

Q. And your company was supplying Windsor Supply Company [230] with extrusions under pur-

(Testimony of Frank K. Miles.)

chase order, whose credit was approved by you at the time? A. Yes.

Q. And the Windsor Supply Company was getting extrusions from Reynolds Metals Company at the same time it was being shorted, Panaview was being shorted and complaining about these shorts to you?

A. I don't know. I would have to look at the records to find out.

Q. Well, you knew Panaview was being shorted? A. No, sir.

Mr. Duque: To which question I object on the grounds it is incompetent, irrelevant, and immaterial and states facts not in evidence.

Mr. Mahoney: Your Honor, there is a series of letters here which reveals that Panaview was being shorted.

The Court: Panaview claims it was being shorted, I suppose.

Mr. Mahoney: And Mr. Miles replies and admits it.

Mr. Duque: I suggest we permit the court to read the letters, Mr. Mahoney. And I think that is a matter for the court's interpretation and not yours or mine at this stage of the proceedings.

The Court: Well, the letters will speak for themselves, I take it. It's a matter of [231] argument.

Mr. Mahoney: Well, your Honor, I did ask the plaintiff whether, at the time Mr. Pinson—

(Testimony of Frank K. Miles.)

The Court: Doesn't his affidavit show when he was extending credit?

Mr. Mahoney: He doesn't go into when he was extending credit.

The Court: Well, why don't you ask him?

Q. (By Mr. Mahoney): When did you first extend credit to Windsor Supply Company?

A. I believe it was December, 1954.

The Court: And you have been extending credit to them ever since?

The Witness: Yes, sir.

The Court: Doesn't that cover it?

Mr. Mahoney: There is one other point in the affidavit—

The Court: That is, if the December, 1954, date is satisfactory?

Mr. Mahoney: That is not correct, your Honor, because—

The Court: Ask him if it isn't a fact that it was an earlier date.

Q. (By Mr. Mahoney): Wasn't there an earlier date when a verbal order was given by Windsor Supply Company to Reynolds Metals Company?

A. I don't know. I only go on the orders that are given to the credit department for approval. I can tell you [232] when we approved the first order that was referred to us.

Q. But it would have been possible that the order could have been in the plant and in the works prior to credit approval by you?

(Testimony of Frank K. Miles.)

A. I only know that the plant is not supposed to do anything without credit-department approval.

Mr. Mahoney: That will be all.

The Court: Any redirect examination?

Mr. Mahoney: Excuse me, your Honor.

(Whereupon there was a conference between counsel.)

Mr. Mahoney: Your Honor, we are attempting here to obtain a stipulation from the defendant, from the records, that the first shipment of extrusions by Reynolds Metals was on December 20, 1954.

The Court: December 20th?

Mr. Mahoney: Yes, your Honor.

The Court: Well, it was covered in the Oldenkamp testimony this morning that the purchases from Reynolds by Windsor extended from September, 1954, to date. Doesn't that cover it?

Mr. Mahoney: Yes, your Honor, that testimony would cover it. We were introducing this as corroborative evidence of Mr. Oldenkamp's statement.

The Court: Is there any dispute about it?

Mr. Duque: No, your Honor, not so far as I know of.

The Court: Anything further? [233]

Mr. Duque: I understand that the date is September?

Mr. Ford: December.

The Court: That is the way it is in my notes. The purchases by Windsor from Reynolds, \$155.-

(Testimony of Frank K. Miles.)

624.97, covered the period from September, 1954, to date.

Mr. Mahoney: Well, your Honor, the negotiations began in September.

Mr. Duque: I don't think the shipments started until December.

The Court: December?

Mr. Mahoney: December 17th.

The Court: Do you both agree?

Mr. Duque: Yes.

Mr. Mahoney: December 17, 1954. That is why we asked for the stipulation, because I don't believe Mr. Oldenkamp testified specifically as to when the shipment started.

That is all, Mr. Miles.

Mr. Duque: No further questions.

The Court: You may be excused.

(Witness excused.)

The Court: Your next witness?

Mr. Duque: I may say in connection with Mr. Miles' affidavit, the reason I offered it is because there is an allegation in the complaint that we financed and thereby unfairly competed with the other competitors, and that is the [234] reason for offering the affidavit, and that is why I consider it relevant.

The Court: Very well. Your next witness?

Mr. Duque: Mr. Yates.

The Court: Mr. Yates' affidavit is Exhibit E.

WILLIAM O. YATES

called as a witness on behalf of the defendant, being first duly sworn, was examined and testified as follows

The Clerk: State your full name, please.

The Witness: William O. Yates.

The Court: Will you please place Exhibit E before the witness?

The Clerk: Yes, your Honor.

(The document was placed before the witness.)

Direct Examination

By Mr. Duque:

Q. Mr. Yates, you have previously read the affidavit which was filed in this action on September 15th and which the clerk has now placed before you? A. Yes, I have.

Q. You know its contents to be true and correct as of this date? A. That is correct.

Q. And you are willing to reaffirm the statements made [235] therein under oath at this time?

A. Yes, I am.

Mr. Duque: No further questions at this time.

Cross-Examination

By Mr. Mahoney:

Q. Mr. Yates, in your affidavit on page 2 thereof, line 13, you indicate that you first came in contact with Panaview Door & Window Co., in the early part of 1954 and at that time you called on Mr. J.

(Testimony of William O. Yates.)

L. Reznick who was a former officer of Glide Windows, Inc.

You know, of course, from the testimony here which I believe you have heard, that Mr. Reznick is still an officer of Glide Windows, Inc., is that correct? A. That is correct.

Q. What was the purpose of your visit to Mr. Reznick?

A. Exactly as stated here in the affidavit. I called to find out, from the sales policy, whether there were any reasons why the unpaid balance of some \$16,000 had not been paid.

Q. Had anyone instructed you to do this?

A. No one had instructed me, no.

Q. No one in the Reynolds Metals Company had told you to go over and see Reznick regarding the payment of the \$16,000? [236]

A. No one had instructed me, no.

Q. How does it happen that in your capacity as regional sales manager you were handling a credit matter?

A. I wasn't handling a credit matter. This was affecting the sales, and I wanted to find out what the problem was, why Mr. Reznick had not paid up.

Q. When you say "affecting the sales," you mean that this debit was preventing you from getting further sales from Panaview and affecting your relationship? A. Yes, that's right.

Q. And you wanted to remove this debit as an obstacle?

A. I wanted to find out what the problems were.

(Testimony of William O. Yates.)

Mr. Duque: Will you speak just a little louder, please, Mr. Yates?

The Witness: All right.

Q. (By Mr. Mahoney): Now, when you visited Mr. Reznick did he at that time discuss with you a new product that Panaview was considering putting on the market? A. No, he did not.

Q. And he didn't discuss the fact that there would be a large number of extrusions needed, and in large quantity, for this new product?

A. No. He talked about how much they were growing and how many more extrusions they would need. But he didn't talk about any specific [237] item.

Q. He didn't mention the new product at all?

A. No.

Q. Now, Mr. Yates, in your affidavit you speak of Mr. Reznick informing you that Panaview was desirous of having some extruded shapes manufactured in connection with a sliding door which it was producing, and wondered whether Reynolds Metals Company would be interested in manufacturing the extruded shapes.

You have previously stated that you didn't discuss the particular product.

Mr. Duque: I object to that as not the testimony of the witness.

Mr. Mahoney: Will you read the last series of questions, please?

(Record read.)

(Testimony of William O. Yates.)

Q. (By Mr. Mahoney): You say, then, that Mr. Reznick did not discuss with you a specific item?

A. No, he didn't discuss a specific item.

Q. And in your affidavit you say, "Mr. Reznick informed me that Panaview was desirous of having some extruded shapes manufactured in connection with a sliding door which it was producing, and wondered whether Reynolds Metals Company would be interested in manufacturing the extruding shapes rerequired."

Don't you consider a sliding door a specific item?

A. Well, "a sliding door." Window and door business—[238] he talked generally about requiring extrusions for a sliding door.

Q. For a sliding door? Is that correct?

A. That is correct.

Q. Now, how did you terminate your conversation with Mr. Reznick? Did you come to a conclusion, as stated, that the debt would be liquidated by the issuance of the note by Glide to Reynolds? Is that correct?

A. No, that is not correct, not on the first call. We left the matter on the first call with Mr. Reznick that unless he paid up, I was sure the matter would be referred to our legal department for collection.

Q. Didn't you tell him that, assuming the credit of Panaview was approved by Reynolds Metals Company, and Glide Windows would execute promissory notes for the unpaid balance, and at that

(Testimony of William O. Yates.)

time didn't Mr. Reznick agree to have the promissory notes executed?

A. Mr. Reznick did agree to have the promissory notes executed on a call that I made with Mr. Miles.

Q. And was this the same call that we are speaking of now? A. Yes.

Q. In other words, when you left, the whole situation had been clarified considerably and Mr. Reznick had agreed to execute the notes, is that [239] right?

A. Well, yes and no—not entirely. He wanted to think about it, and he would let us know.

Q. But your affidavit says that Mr. Reznick agreed to have the promissory notes executed.

A. Well, subsequently he did agree.

Q. Not at that meeting? A. That's right.

Q. Now, you mention an assembly picture of the sliding door which was received by you from Panaview. Are you an engineer, Mr. Yates?

A. No, I am not an engineer.

Q. Now, do you know the distinction between an assembly picture and a cross-sectional diagram?

A. Do I know the distinction between an assembly picture and cross-section? Yes, I do.

Q. Now, I show you Plaintiff's Exhibit 6 and ask you if you recall whether this was the drawing which you saw at the time the "assembly picture" was processed by your extrusion engineering department. A. I don't remember.

Q. Can you remember what the "assembly pic-

(Testimony of William O. Yates.)
ture" you saw showed?

A. I just recall that it was an assembly, not showing too much detail.

Q. Were there cross-sections of the [240] individual extrusions? A. I don't remember.

Q. Was there a cross-section of the assembly of the door as shown in Plaintiff's Exhibit No. 6?

A. I don't remember.

Q. In other words, you don't remember anything about the drawing, do you?

A. I just remember that an assembly drawing came in, which I took a quick look at, and that is all.

Q. But when you say "assembly drawing," you don't even remember whether it was an assembly drawing, do you?

A. Yes, I remember. It was an assembly drawing.

Q. Well, what kind of an assembly drawing was it, of what?

A. It was an assembly drawing of a sliding door.

Q. Was it in cross-sectional form?

A. I have no idea.

Q. Mr. Yates, in your affidavit you say it was a full cross-section picture of the proposed sliding door, and now you say you don't remember.

Do you realize, Mr. Yates, that your testimony here is under oath? A. Yes.

Q. Now, which is true: That the assembly picture which you saw was a full cross-sectional pic-

(Testimony of William O. Yates.)

ture of a proposed [241] sliding door, or don't you remember what it was?

A. If this is described as a full cross-sectional, this is exactly what I saw (indicating).

Q. That is, that drawing is exactly what you saw?

The Court: "That drawing" is exhibit—

Mr. Mahoney: Plaintiff's Exhibit No. 6.

Q. Is that right? A. Yes.

Q. Now, Mr. Yates, you refer to "my extrusion engineering department." Is the extrusion engineering department under your supervision?

A. Yes.

Q. Are you fully acquainted with the procedures which take place therein? A. Not fully.

Q. Do you know what happens when a drawing such as Plaintiff's Exhibit No. 6 is submitted to the extrusion department?

A. Yes, I know that it is processed and carefully checked for tolerances, and our die prints are prepared.

Q. And what are these die prints based upon?

A. What are these based upon?

Q. Yes. Aren't they based upon the drawings which are submitted to you by the customer?

A. Well, yes, they are. [242]

Q. And do you recall whether there were any changes made in the construction or design of the extrusions or of the assembly which is shown in Plaintiff's Exhibit No. 6, by Reynolds Metals Company in its extrusion engineering department?

(Testimony of William O. Yates.)

A. Yes. Mr. Meyer advised me that he made several changes.

Q. Now, are you familiar with those changes?

A. No, sir.

Q. In other words, your statement regarding required modifications is hearsay. In other words, you don't know of your own knowledge whether modifications were required in the drawings submitted by the plaintiff to the defendant and which ultimately resulted in the preparation of the die prints by the Reynolds Metals extrusion department?

A. I know that Mr. Meyer worked on this quite a bit.

Q. He told you this?

A. No. Well—I mean, I am there every day. I knew that he was working on it.

Q. But you wouldn't know whether he was making changes or just copying the drawings, would you? Do you supervise him that closely?

A. Yes, I do.

Q. Can you say, then, of your own knowledge, that modifications were made? [243]

A. Yes, I can.

Q. Were these serious modifications?

A. I would say that they were.

Q. In the shape of the extrusions?

A. Yes.

Q. I show you Plaintiff's Exhibit No. 6, which is the drawing that was submitted by the plaintiff to

(Testimony of William O. Yates.)

the defendant, and I show you the die prints, Plaintiff's Exhibit No. 8, which were submitted by Reynolds Metals Company to the plaintiff for its consideration and review; and I ask you to show me where the modifications which were made by Reynolds Metals Company in the die prints as compared with the original drawing were made.

A. Well, I am not prepared to answer it until I study this for a while.

Q. Well, at the time you made this affidavit you were prepared or you wouldn't have made the statement.

A. Well, I know there were considerable dimensional changes made.

Q. Now, isn't it possible, Mr. Yates, that these dimensional changes might be more apparent than real, that a different point on the extrusion might be taken to create an illusion of a dimensional change? Let us say, for example—and I am now—

The Court: Won't Mr. Meyer be called? [244]

Mr. Duque: Yes, your Honor.

The Court: Let's save some time.

Mr. Mahoney: All right, your Honor.

That will be all, Mr. Yates.

Your witness, Mr. Duque.

Mr. Duque: No further questions.

The Court: You may step down, Mr. Yates.

(Witness excused.)

The Court: Your next witness?

Mr. Duque: Mr. Meyer, take the stand, please.

The Court: Mr. Meyer's affidavit is Exhibit D.

OSCAR J. MEYER, JR.

called as a witness on behalf of the defendant, being first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness Oscar J. Meyer, Jr.

Direct Examination

By Mr. Duque:

Q. Mr. Meyer, have you read your affidavit, the original of which is filed in this Court, and which the clerk has placed before you?

A. Yes, I have.

Q. Do you know of your own knowledge, as of the present date, that the facts stated therein are correct and [245] true and that you would be willing to swear to them under oath at this time?

A. They are.

Mr. Duque: No further questions at this time, your Honor.

Cross-Examination

By Mr. Mahoney:

Q. Mr. Meyer, in your affidavit you mention that you left Purdue University in 1948. Are you a graduate of Purdue University?

A. No, I am not.

Q. Are you a registered engineer in the State

(Testimony of Oscar J. Meyer, Jr.)
of California? A. No, I am not.

Q. What are your qualifications for the position which you hold at the Reynolds Metals Company?

A. Well, I have had four years of engineering training at Purdue University. The fact that I don't hold an engineering degree is that the last year I attended Purdue I was working towards two degrees, and though I have the total number of hours required for an engineering degree there are certain senior-year credits which I still lack. But during that time I have had training in mechanical drafting, various mechanical engineering courses which deal in problems of assembly fits, [246] machine fits, machine design, actual design of objects like mechanical jacks and various other items.

Q. Now, Mr. Meyer, I notice on page 1, lines 24 through 29 of the affidavit, you set forth the duties which you perform, and among them the operation of the Los Angeles extrusion engineering department. Do you perform that function under Mr. Yates' supervision? A. I do.

Q. And did Mr. Yates submit to you a drawing which was a Panaview Door & Window Company drawing, for your review and for the making of die prints?

A. A print which was submitted to me which was evidently run off of this tracing which was—

Q. Will you look—excuse me for interrupting.

A. —used for the purpose of making section drawings.

Q. Will you look at Plaintiff's Exhibit No. 6,

(Testimony of Oscar J. Meyer, Jr.)

whether the tracing was a copy of Plaintiff's Exhibit No. 6?

A. Yes. I checked this tracing against the print which we have in our file.

Q. This, then, is actually identical, so far as you have been able to determine, with the tracing which was received by you in your department?

A. That's right.

Q. Now, Mr. Meyer, do you notice that upon that drawing, Plaintiff's Exhibit No. 6, there is a plurality of cross-sectional [247] extrusions, extrusion shapes? A. Yes, there are.

Q. And that these extrusion shapes are marked 1-X to 9-X serially? A. That's correct.

Q. Now, before you received a print of this drawing, Plaintiff's Exhibit No. 6, from Mr. Yates, had you ever assisted anyone, including Mr. Grossman, at the Panaview Door & Window Co., in the design of these extrusions?

A. Prior to that time, no.

Q. In other words, Mr. Grossman at no time called you in and asked you for your advice or consulted with you as to the dimensions or the size or the shapes of the extrusions? A. No.

Q. Have you ever been engaged in the manufacture of aluminum-frame sliding doors?

A. No, sir.

Q. Have you ever sold aluminum-frame sliding doors? A. No, I have not.

Q. Therefore, all the information which was imparted to you regarding this product came in the

(Testimony of Oscar J. Meyer, Jr.)

form of a print of drawings, of the drawing on Plaintiff's Exhibit No. 6?

A. Pertaining to this particular product, yes.

Q. Now, will you explain, by reference to Plaintiff's Exhibit No. 8, which is a sheet of die prints, whether you [248] made the originals of the drawings shown in the prints yourself personally?

A. No, I did not make the drawings.

Q. Were these drawings made under your supervision? A. They were.

Q. Now, do you know whether any significant modifications were made in any of the extrusions as shown in the drawing, Plaintiff's Exhibit No. 6, as compared with the die prints shown in Plaintiff's Exhibit 8?

Would you compare them with the extrusions as shown in Plaintiff's Exhibit No. 6?

A. One change which is apparent on Section 4-X was the addition of special commercial tolerances to facilitate assembly of that section with the stiles.

Q. Now, will you explain what you mean by "commercial tolerances"?

A. Commercial tolerances in the extrusion industry will vary plus or minus a certain amount, depending upon the type of dimension, whether it is a metal dimension or a space dimension. On these drawings, as submitted to our department, the same nominal dimension in the case of the stiles and in the case of the top and bottom rails. Now, had we dimensioned both the top and bottom rails and the stiles section using that same nominal dimension,

(Testimony of Oscar J. Meyer, Jr.)

conceivably those parts would never have assembled together in the manner in which it [249] was intended.

Q. You say conceivably. You don't know actually whether they would have assembled together, do you?

A. They could have assembled together, possibly. But there would be no guarantee that they would.

Q. But you have no guarantee that they would have not? A. No.

Q. Now, will you show me and the Court wherein this change was made? We are now referring, for the record, to Plaintiff's Exhibit 6 for identification, and that is—

The Court: 6 is in evidence, is it not?

Mr. Mahoney: I am sorry, your Honor. 6 in evidence. I said "for identification" automatically.

And we are also referring to Plaintiff's Exhibit 8 and print No. 4-X. It's drawing No. L-8438.

Q. (By Mr. Mahoney): Now, what is this change that you refer to?

A. The addition of these special tolerances to the .812 dimension, which does not appear on this tracing.

Q. In other words, all you added there was the tolerance figure .812, is that correct?

A. No. The dimension is shown .812. We added a tolerance, plus nothing, minus .020.

Q. Oh, in other words, the tolerance was actually

(Testimony of Oscar J. Meyer, Jr.)

shown, the dimension was actually shown but all you did was [250] add the tolerance?

A. The dimension, as shown on the customer's tracing, carries in our interpretation a tolerance of plus or minus ten-thousandths. This is the addition of a special commercial tolerance.

Q. So you added ten-thousandths more, is that correct?

A. We put the tolerance all on one side.

Q. I see.

A. We further changed the design on the serrations, which the customer did not detail, designing them so that they would not be wiped out in the process of extrusions.

Q. Isn't that inherent in standard extrusion design, that you would take a detail like that and design it for use with the manner in which you made the dies?

A. It is not the manner in which we make the dies. It is to guarantee the customer the end product that he desires.

Now, to design the section drawings from which our people make their die drawings and resulting dies, it is necessary to put certain radii on to guarantee that the dies servicing those areas will not be wiped out in the process of extruding and as a result would not have serrations to hold the weatherstripping in place.

Q. Comparing the two cross-sections and the overall dimensions thereof, was there any significant change in [251] shape between the two cross-sec-

(Testimony of Oscar J. Meyer, Jr.)

tions? A. In the shape itself? No.

Q. Are there any other contributions which were made by you, as an employee of the Reynolds Metals Company, to the design of the extrusion?

A. Well, the same problem holds true in the top rail, Section 5-X.

Q. Was this once again the addition of tolerances?

A. That's right. Now, at the time that these prints were submitted to the customer the question of the actual assembly between the jamb sections, the header and the sill sections were raised. These are not the latest prints. We made these drawings on the basis of the dimensioning shown by customer, which would mean that these sections would not assemble again, the jamb sections into the header and into the sill sections the way the customer intended.

Q. Do you mean that the extrusions as shown in those prints could not be assembled into a sliding door sash and frame?

A. There is no guarantee that they would assemble.

Q. Well, do you have any guarantee that they wouldn't? A. No.

Q. Did you make any significant changes in any of the shapes of any of the extrusions shown in the drawings in Plaintiff's Exhibit 6 and Plaintiff's Exhibit 8—in [252] Plaintiff's Exhibit 8?

A. There was another problem raised with the top rail as to the insertion of weatherstripping. I

(Testimony of Oscar J. Meyer, Jr.)

was asked by the salesman to make a personal call upon the customer to discuss this particular problem, which I did.

At that time they submitted a revised print revising the top rail section, which is shown as 5-X, changing the weatherstripping detail. That detail in itself was not sufficient to guarantee the assembling of the weatherstrip within it, because at a later date I received a print from the customer showing the detail of the Schlagel weatherstripping section and the nominal dimensions of that weatherstripping were the same in the thickness and width as the dimensions on the extrusion. Again, not allowing for tolerances on the extrusion and the tolerances on the weatherstripping there is no guarantee that they would have assembled.

Q. But there is no guarantee they wouldn't have?

A. With the same nominal dimension in width of .437, the inherent straightness of the individual shapes, it would be impossible, except under terrific force, to assemble them.

Q. In any instance did you suggest the overall shape of an extrusion to Mr. Grossman or any employee of the Panaview Door & Window Co.?

A. The overall shape? No.

Q. What did you really supply in the way of information [253] to Mr. Grossman, or to any other employee of the Panaview Door & Window Co., in the way of technical knowledge?

(Testimony of Oscar J. Meyer, Jr.)

A. The use of tolerances to effect the assembly of their various parts with one another.

Q. But you didn't at any time do more than disclose tolerances?

A. Other than the minor changes that I have shown you on the sections to facilitate the holding of the weatherstripping within the sections.

Q. That is all you did?

A. That and the weatherstripping in the top rail.

Q. That is all the modification that was accomplished by your department in handling this drawing?

A. That is the total on the modifications.

Q. Now, Mr. Meyer, is it not true that it is the practice of the extrusion trade to have the extrusion engineering department guarantee the detail of tolerances in relationship to assembly?

A. Would you repeat that question?

Q. Is it the practice in the trade, in other words, in the department such as the one with which you are connected, wherein you take drawings from a customer, is it not the practice to check out the tolerances, and isn't that part of your job and part of the duty you perform for the customer?

A. Knowing the end use of the extrusions we do attempt [254] to work out a product which will suit the customer's purpose in the best way. Which would mean to work out assembly tolerances or assembly dimensions for him and with him.

Q. But so far as Plaintiff's Exhibit 6 is con-

(Testimony of Oscar J. Meyer, Jr.)

cerned, and so far as your knowledge of Defendant's Exhibit A is concerned, are the bulk of the tolerances and the bulk of the dimensions which were presented by the plaintiff to your department substantially unchanged?

A. The bulk of the dimensions, yes.

Q. Now, you have previously testified in your affidavit that there was nothing in the Panaview Door & Window Co. design which was unique or unusual. What is your qualification for that statement, Mr. Meyer?

A. When I started work with Reynolds Metals Company I was originally employed as a drafting engineer in Louisville, whose job it was to take sections, or to take prints submitted by customers, make the necessary section drawings from these and to work up pricing information. In that position I became well acquainted with I would say well over four or five thousand various sections.

I then was transferred from that department into the architectural division, where again I was—my duties brought me in contact with various architectural applications, store fronts, windows, sliding windows, doors. The work there was composed of design of certain extrusions, working [255] with standard architectural shapes which are in distributors. And from that job I was sent to Phoenix for six months' training course in our Phoenix extrusion mill. There I worked from the beginning end of the metal coming into the plant until the time it is shipped out of the plant, working in the

(Testimony of Oscar J. Meyer, Jr.)

various phases and again coming into contact with several hundred other additional shapes.

From that time I have been transferred to the Los Angeles where I have operated in the position as regional extrusion engineer, again coming into contact with various extrusions.

Q. When you say there was nothing unique or unusual, you mean you have seen identical extrusions to these many times?

A. I have seen extrusions which incorporated the same features that these extrusions incorporated.

Q. Have you seen extrusions which were the same? A. Identical.

Q. You say that they are not unique. So if they are not unique or unusual you must have seen substantially similar or identical extrusions.

The Court: Do you mean in shape or dimension?

Mr. Mahoney: In shape.

The Witness: Basically, part for part, a header section used in this door is quite similar to header sections in other doors. [256]

Q. (By Mr. Mahoney): Have you any documentary evidence which would go to prove your statement in that regard?

A. I have none presently.

Jamb sections are similar in nature.

Q. Are you talking about the function or the design of the extrusion?

A. You asked me about the shape of the extru-

(Testimony of Oscar J. Meyer, Jr.)

sion and their similarity to other shapes which I have come into contact with.

In my experience in hundreds of extrusions or drawings that I have seen and processed, I have seen other sections, header for header, jamb for jamb, and so forth, that are similar in design.

Q. But not identical in shape with these?

A. Identical? No.

Q. And do you know of your own knowledge, and did you know when you wrote and read and signed this affidavit, that the dimensions of such prior art extrusions which you have referred to were the same as the dimensions shown on Plaintiff's Exhibit No. 6?

A. Did I have prior knowledge that the dimensions of other shapes were—

Q. Did you have a knowledge—

Mr. Mahoney: Read the question, please.

(Question read.) [257]

Mr. Duque: Excuse me. I didn't quite get that. Was that "prior art extrusions"?

Mr. Mahoney: That's right.

Mr. Duque: Prior art, a-r-t?

Mr. Mahoney: That's right. Excuse me, Mr. Duque. This is common parlance for patent attorneys. What it means is that any of these extrusions which are prior in time to the witness' statement. In other words, he was referring to things he had seen in the past and it was prior in time, and we refer to the particular field as "art."

(Testimony of Oscar J. Meyer, Jr.)

Mr. Duque: I apologize for my ignorance. I just didn't know the phrase, your Honor.

Mr. Mahoney: Will you answer the question?

The Witness: I wonder if you would rephrase it. I still don't know or follow what you are asking. You are asking if I—

Mr. Mahoney: Well, I will give you the question again.

Q. (By Mr. Mahoney): When you speak of these previous extrusions, and then you compare them to the extrusions shown in the drawings, have you any basis or recollection that the dimensions which were part of the previous extrusions were the same as the dimensions shown in those drawings?

A. No. I did not say that the dimensions were identical.

Q. Have you ever designed aluminum frame sliding [258] doors? A. No, I have not.

Q. Have you ever designed the extrusion for an aluminum frame sliding door?

A. I have aided in the design of extrusions for a sliding door.

Q. But you yourself have not by yourself designed the extrusions for an aluminum sliding door?

A. Not in its entirety, no.

Q. Now, in your affidavit you say, "To my own knowledge and from my experience as an extrusion engineer"—

Mr. Duque: Where are you reading?

(Testimony of Oscar J. Meyer, Jr.)

Mr. Mahoney: On page 4.

Well, we might start on page 3.

"In the Los Angeles office my department has made in the past two years more than 1300 extrusion drawings for the manufacture of extrusions for individual customers, and within Reynolds Metals Company there are more than 15,000 individual extrusion drawings. To my own knowledge and from my experience as an extrusion engineer, I know that hundreds of these drawings are similar in shape and design, and in a number of cases, are identical * * *"

When you made that statement you weren't referring, by [259] the word "identical," to the extrusions for the Panador?

A. Identical? No.

Mr. Mahoney: That will be all.

The Court: Any redirect examination?

Mr. Duque: Yes, your Honor.

Redirect Examination

By Mr. Duque:

Q. Mr. Meyer, you have described the changes that you have made in the original drawings which were submitted by Panaview to you. Without the changes which you made in the tolerances and the weatherstripping would the door, in your opinion, have worked?

Mr. Mahoney: Objection, your Honor. The wit-

(Testimony of Oscar J. Meyer, Jr.)

Mr. Duque: I apologize for my ignorance. I just didn't know the phrase, your Honor.

Mr. Mahoney: Will you answer the question?

The Witness: I wonder if you would rephrase it. I still don't know or follow what you are asking. You are asking if I——

Mr. Mahoney: Well, I will give you the question again.

Q. (By Mr. Mahoney): When you speak of these previous extrusions, and then you compare them to the extrusions shown in the drawings, have you any basis or recollection that the dimensions which were part of the previous extrusions were the same as the dimensions shown in those drawings?

A. No. I did not say that the dimensions were identical.

Q. Have you ever designed aluminum frame sliding [258] doors? A. No, I have not.

Q. Have you ever designed the extrusion for an aluminum frame sliding door?

A. I have aided in the design of extrusions for a sliding door.

Q. But you yourself have not by yourself designed the extrusions for an aluminum sliding door?

A. Not in its entirety, no.

Q. Now, in your affidavit you say, "To my own knowledge and from my experience as an extrusion engineer"——

Mr. Duque: Where are you reading?

(Testimony of Oscar J. Meyer, Jr.)

Mr. Mahoney: On page 4.

Well, we might start on page 3.

"In the Los Angeles office my department has made in the past two years more than 1300 extrusion drawings for the manufacture of extrusions for individual customers, and within Reynolds Metals Company there are more than 15,000 individual extrusion drawings. To my own knowledge and from my experience as an extrusion engineer, I know that hundreds of these drawings are similar in shape and design, and in a number of cases, are identical * * *"

When you made that statement you weren't referring, by [259] the word "identical," to the extrusions for the Panador?

A. Identical? No.

Mr. Mahoney: That will be all.

The Court: Any redirect examination?

Mr. Duque: Yes, your Honor.

Redirect Examination

By Mr. Duque:

Q. Mr. Meyer, you have described the changes that you have made in the original drawings which were submitted by Panaview to you. Without the changes which you made in the tolerances and the weatherstripping would the door, in your opinion, have worked?

Mr. Mahoney: Objection, your Honor. The wit-

(Testimony of Oscar J. Meyer, Jr.)

ness has already testified that he had no guarantee that it would not function.

The Court: This is a different question and calls for a different answer. Overruled.

Mr. Mahoney: Work and function mean substantially the same thing, your Honor.

The Court: There is quite a difference between opinion and guarantee.

Mr. Duque: I am asking for his opinion and not his guarantee, your Honor.

The Court: He may answer. Overruled.

The Witness: Without the changes it is my opinion that [260] the door would not have assembled together.

Q. (By Mr. Duque): Now, you state in your affidavit, Mr. Meyer, that at no time did you ever disclose to anyone or any competitors any of the information which you received from them on that drawing. Did you ever discuss with anybody else outside of the Reynolds Metals Company any of the material that was furnished to you by Panaview?

A. I did not.

Q. Did you at any time ever—

Mr. Mahoney: Your Honor, this line of questioning is objected to on the ground that it is not within the scope of redirect examination.

Mr. Duque: It is in the scope of the direct in that it is in the affidavit.

The Court: It is not rebuttal of the cross, is that what you mean?

(Testimony of Oscar J. Meyer, Jr.)

Mr. Mahoney: It is not proper redirect examination.

The Court: It is not rebuttal of the cross—

Mr. Mahoney: Yes.

The Court: —so, hence, it is not proper redirect. Sustained.

Mr. Duque: Very well. I have no further questions.

The Court: You may step down, Mr. Meyer.

(Witness excused.)

The Court: How much longer will your evidence be for [261] the defendant, Mr. Duque?

Mr. Duque: We will call Mr. Sargeant and Mr. Hairston, who is now out with Mr. Pinson. And I believe that will conclude our case, your Honor. I would say that it would take not more than an hour, sir.

The Court: Do you anticipate any extended rebuttal?

Mr. Mahoney: No, your Honor.

Mr. Duque: Oh, I am sorry, your Honor. There is one other witness that I do intend to call, and I overlooked him. I intend to call Mr. Gunderson of the Windsor Manufacturing Company. His testimony should be very, very brief. I would say that an hour or an hour and a half would complete our case.

The Court: We should possibly close the evidence by noon tomorrow then?

Mr. Mahoney: We will make an effort to do so, your Honor.

Mr. Duque: Yes, your Honor.

The Court: Very well. We will take the recess at this time until tomorrow morning at 10:00 o'clock.

Mr. Clerk, will you adjourn the Court.

(Whereupon, a recess was taken until 10:00 o'clock a.m. of the following day, November 23, 1955.) [262]

Wednesday, November 23, 1955—10:00 A.M.

The Court: Are there any ex parte matters?

The Clerk: No, your Honor.

The Court: In the case on trial, you may proceed.

Mr. Duque: Your Honor, yesterday afternoon and during the evening Mr. Pinson and Mr. Hairston of the Reynolds Metals Company collaborated on checking the figures which are offered here in evidence as Plaintiff's Exhibit 24 for identification. And subject to our right—well, I might say first that Mr. Hairston does not agree with the figures, but I will withdraw my objection to the introduction of the exhibit subject to my right, when we put Mr. Hairston on the witness stand, to go over these figures and explain what he believes are incorrect in them.

The Court: Very well. Exhibit 24 for identification is now received in evidence.

(The exhibit referred to, marked Plaintiff's Exhibit 24, was received in evidence.)

PLAINTIFF'S EXHIBIT No. 24

Panador Cost Data

8/54

Panador Dept.=1/55

6'10"

Av. Wage=\$1.59

(50 Door Run)

	Amt.	Cost Unit	Total Cost	Labor Hrs.	At 100% Standard	At 60% Standard
t	8'	0.25	\$ 2.00	.076		
2	8'	0.26	2.08	.045		
3	14'	0.234	3.28	.164		
	8'	0.288	2.30	.152		
	8'	0.208	1.66	.119		
	14'	0.223	3.12	.227		
	14'	0.24	3.36	.057		
			—	—		
			\$17.80	.840		
up				.050		
tal				.890 @ 1.59	1.42	2.36
st Cap	1		.017			
umper Assy.	2	.147	.294			
all Bumper	4	.006 +	.260			
p Air Barrier	1		.136			
s Jamb	14'	.032	.448			
s Top Rail	8'	.071	.568			
s Bottom Rail	8'	.032	.256			
lers	4	.400	1.60			
	4	.006	.024			
using	4	.083	.333			
el	4	.043	.172			
y. Screws	8	.078	.624			
ch	1	.191	.191			
like	1	.047	.047			
ets	2	.003	.006			
cks	4	.21	.84			

Part	Amt.	Cost Unit	Total Cost	Labor Hrs.	At 100% Standard	At 60% Standard
Allen Wrench	1		.02			
w/s Neoprene	7'	.0287	.201			
Vinyl	44'	.035	1.54			
Inst. Screws	16	.0045	.072			
Paper Bag	1	.002	.002			
Cloth Bag	1	.026	.026			
Carton	1	.468	.468	.2 @ 1.85		
					.37	
			*\$ 8.145			
			\$25.94			
					\$27.73	\$28.675

[*Appears in red ink on original copy.]

Received in evidence November 23, 1955.

The Court: What about Plaintiff's Exhibit No. 25, the sales summary?

Mr. Duque: The same thing would prevail with that.

The Court: Very well. Plaintiff's Exhibit No. 25 for identification is received in evidence. [265]

(The exhibit referred to, marked Plaintiff's Exhibit 25, was received in evidence.)

PLAINTIFF'S EXHIBIT No. 25

Inter-House Correspondence

Use This Form for All House Correspondence
Write on One Side of Paper Only

Date: November 14, 1955.

To: Mr Pinson. From: Rose White.

Subject:

Volume of Panador business 1954—\$135,995.24.

Volume of Panador business 1955—January thru June, inclusive, \$266,849.42.

Received in evidence November 23, 1955.

The Court: And what of the average sales price of plaintiff's door?

Mr. Mahoney: They have also discussed the average sales price based on the total number of doors which were sold during the period consisting of the latter part of 1954 to June, 1955, and they are in substantial agreement on that figure. The total figure for 1954 is 2,142 doors, and the total figure in 1955 is 4,145 doors.

However, it should be explained that in the early part of the sale of the doors in 1954 approximately 200 Panador doors were shipped and invoiced as Panador doors due to failure to get the materials in time to fill certain orders. So at most that would be a disparity between the figures of the plaintiff

and figures of the defendant of approximately 200 doors.

Mr. Duque: That's correct, your Honor.

The Court: So stipulated?

Mr. Duque: Yes, your Honor.

The Court: Now, what is the average sales price?

Mr. Mahoney: Derived was the figure of \$62, plus or minus a few cents, in 1954; and \$65, plus or minus a few cents, in 1955.

The Court: In other words, approximately \$62 during [266] 1954 and approximately \$65 in 1955. Is it so stipulated?

Mr. Duque: Yes, your Honor.

The Court: Very well. That concludes the plaintiff's case in chief, then, does it?

(Whereupon, there was a conference between counsel.)

Mr. Mahoney: Excuse us, your Honor. We are considering another stipulation here.

It is stipulated by counsel here that the acknowledgment on Purchase Order No. P-2502 was received in the plant of the Reynolds Metals Company on approximately February 3rd, 1955, and because of the lack of the records of the Reynolds Metals Company we cannot put into evidence the actual acknowledgment. Is that correct?

Mr. Duque: Yes. The record apparently, your Honor, is not in these records we have here and is either in the Phoenix plant or the Louisville plant. But we will stipulate to that date.

The Court: I don't immediately get the significance of that.

Mr. Mahoney: The significance here, your Honor, is to show that during the period of time when Reynolds Metals was supplying Windsor Supply, the plaintiff had an order in the defendant's plant for extrusions, and that when the incomplete orders were shipped to the plaintiff the defendant was, also, simultaneously shipping extrusions to Windsor Supply. [267]

We rest our case your Honor.

Mr. Duque: May I proceed, your Honor?

The Court: Yes.

Mr. Duque: Mr. Sargeant, will you take the stand, please?

HARRY M. SARGEANT

called as a witness on behalf of the defendant, being first sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Harry M. Sargeant, S-a-r-g-e-a-n-t.

The Court: Mr. Sargeant's affidavit is here, Mr. Clerk?

The Clerk: Yes, your Honor, I think it is.

Mr. Duque: Yes, your Honor, it is Exhibit C, Defendant's Exhibit C.

The Court: Will you place Defendant's Exhibit C before the witness, Mr. Clerk?

(Whereupon, the document was placed before the witness.)

(Testimony of Harry M. Sargeant.)

Direct Examination

By Mr. Duque:

Q. Mr. Sargeant, you have before you the affidavit which was filed in this action on September 14th and which was sworn to by you. Do you have that before you? A. Yes, I do.

Q. Have you read that affidavit?

A. I have. [268]

Q. Are the facts and statements contained in that affidavit true and correct as of this date?

A. Yes, they are.

Q. And would you be prepared to swear under oath as to the facts set forth in this affidavit?

A. I am.

Mr. Duque: You may cross-examine, Mr. Mahoney.

Mr. Mahoney: No questions, your Honor.

The Court: You may step down, Mr. Sargeant.

(Witness excused.)

The Court: Your next witness?

Mr. Duque: I will call Mr. Hairston.

JAMES M. HAIRSTON

called as a witness on behalf of the defendant, being first sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: James M. Hairston, H-a-i-r-s-t-o-n.

The Court: Mr. Hairston's affidavit is Exhibit B?

(Testimony of James M. Hairston.)

Mr. Duque: Yes, your Honor.

The Court: Is it before the witness, Mr. Clerk?

The Clerk: Yes, your Honor.

Direct Examination

By Mr. Duque:

Q. Mr. Hairston, you have before you your affidavit which was filed in this action. Have you read that affidavit? [269] A. Yes, sir.

Q. Do you know the facts therein to be true?

A. Yes, sir.

Q. And would you testify to those same facts under oath? A. Yes, sir.

Q. If so asked? A. Yes.

Q. Thank you. Now, Mr. Hairston, I show you Defendant's Exhibit 24, which is the cost sheet which I believe you reviewed yesterday afternoon and last evening with Mr. Pinson of the plaintiff company. A. Yes, sir.

Q. Will you tell us wherein you disagree with the conclusions that were arrived at by Mr. Pinson in that sheet?

A. Yes, sir. First of all, this, in my opinion, cannot be submitted as an actual cost. At best it is an estimated cost of the Panador.

The Court: It was offered as an estimated cost, was it not?

Mr. Mahoney: Yes, your Honor.

The Court: I understood that was the most plaintiff claimed for it, that it was an estimated cost.

Testimony of James M. Garrison.

Mr. Justice: I think I understand that your Honor I understand that they were claiming it to be the actual cost. [170]

Mr. Maloney: We pointed out that this figure was run at 75% of all the early time at the beginning of the production, and that perhaps there would be small differences between these figures and the later production figures. This was the figure run in Dec. So it necessarily would have to be as of the later date, an estimated cost.

Mr. Justice: I understood that it was offered, not as the precise cost but as the estimated cost. Is that correct?

Mr. Maloney: That is correct, your Honor.

Mr. Justice: Well, if it is offered as an estimated cost, your Honor what value is it? If I had understood that well, I will move at this time to strike it from the record if it is simply an estimate of their cost.

Mr. Maloney: It is based on a factual basis. An audit is made of the actual production of the door, and the cost figures actually taken therefrom. The only way in which the figure is an estimate is in that it was taken from a sample of all doors, as was pointed out by the witness when the exhibit was presented. Obviously you cannot maintain a cost audit in a continuous series of doors, and there has been some sampling to obtain a cost figure and this is consistent with standard procedure.

Mr. Justice: Well, I have to strike the document, your Honor, in the records that it is incor-

(Testimony of James M. Hairston.)

petent, irrelevant and immaterial and does not tend to prove or disprove any issue [271] in this case, if it is simply an estimate.

The Court: Well, it tends to prove the cost of producing these doors by plaintiff, doesn't it? Doesn't your objection go to the weight rather than the admissibility?

Mr. Duque: I suppose it would, your Honor.

The Court: Overruled.

Mr. Duque: May I interrogate the witness with regard to this?

The Court: You may. I merely interrupted in the interest of time.

Mr. Duque: Thank you.

Q. (By Mr. Duque): In reviewing the Pandor Cost Data records, which you did yesterday with Mr. Pinson, do their entire records support that estimated cost which appears on Exhibit No. 24?

A. Insofar as the records that were available they do. Such records as I reviewed were the metal costs, input metal costs to their plant. And we selected a few of the purchase parts which they have included here, and we found minor differences. But the grand total is so insignificant, the total of the parts is so insignificant to the total costs, that I believe that it would be reasonable to that extent.

Q. Does that document reflect any overhead?

A. No, sir. This document is a direct cost margin [272] approach to a costing of a product. It has no overhead at all contained in it.

(Testimony of James M. Hairston.)

Q. And is a direct approach the customary approach in arriving at cost?

A. Only for certain purposes.

Q. For this purpose?

A. Not for determining the cost of a product.

Q. So that this method of arriving at this cost which appears in that document is not the customary accounting method to use, is that correct?

A. Not to establish what I would say would be a profit and loss statement on this particular product.

Q. Now, Mr. Hairston, there has been stipulated in this case that a die charge was made for the production of the manufacturer of the dies which were used to produce the extrusions for Panaview. And that stipulated amount is—

A. \$1430, I believe.

Q. \$1435? A. \$1430.

Q. \$1430? A. Yes, sir.

Q. Now, do you know what the actual cost of producing that die was to the Reynolds Metals Company? A. Each one? Yes, sir.

Q. I mean the cost of each of the dies. [273]

A. Yes, sir.

Q. Will you tell us what those costs are, please?

A. Would you want it by die, or would you like the total that would be comparable to the total invoice?

Q. I think you should give us the total figure and then break it down by dies.

(Testimony of James M. Hairston.)

A. The total cost of the nine dies which were originally produced in order to comply with the section orders from Panaview was \$3,176.06.

Q. Now, would you break that down?

A. To what extent, sir?

Q. What did you give as the total cost?

A. \$3,176.06. That includes the cost of the die block or metal needed to make the die and the—only the labor of the actual manufacturer of the die.

Q. I see.

Now, Mr. Hairston, in your capacity as controller of the extrusion plant in Phoenix, do you know the practice of the Reynolds Metals Company in connection with the use of dies which are made for extrusions of one customer and the use of those dies for another customer? A. Yes, sir.

Mr. Mahoney: This question is objected to, your Honor, on the grounds that it is incompetent, irrelevant and immaterial. A stipulation was made that the custom and usage [274] would not be brought into evidence here.

Mr. Duque: I am not attempting to show custom and usage. The plaintiff has attempted, by introduction of certain records here of Windsor Supply Company, to indicate what is the practice of the Reynolds Metals Company in connection with the use of its dies which are made to extrude extrusions for one company in using those dies for another customer. And I am asking him not what is the custom and usage in the trade but what is

(Testimony of James M. Hairston.)

the practice of the Reynolds Metals Company to rebut the testimony that has been put in by plaintiff.

Mr. Mahoney: There has been no foundation laid by the plaintiff to show that we knew anything about the internal practice of the defendant whatsoever.

The Court: Sustained.

Mr. Duque: Well, your Honor, my notes indicate—and I could be wrong and probably am—but my notes indicate that there was testimony that has been adduced in this case which purports to show that it was the practice of the Reynolds Metals Company in its internal operation to only use the dies that it made to extruded extrusions for Corporation A for that corporation, and to never use the dies to extrude extrusions for any other corporation.

Now, if there is no such testimony then obviously this is irrelevant. But I was offering it to rebut that and to show what the practice of the Reynolds Metals Company is [275] and has been for some time with regard to the use of dies which it owns and upon which only a service charge is paid by the customer.

That is the only purpose of it. If I am in error and there is no such contention or no such claim——

Mr. Mahoney: I don't think Mr. Duque is in error as to the testimony, but the distinction here is between what was told the plaintiff by representatives of the defendant and what was the internal

(Testimony of James M. Hairston.)

practice of the defendant, with which the plaintiff could not possibly have been cognizant.

The Court: Well, unless you expect to show that it was brought home to the plaintiff in some way—

Mr. Duque: Pardon me?

The Court: It seems to me that it is self-serving unless you could tie it up to the plaintiff in some manner so as to show that this was brought home to the plaintiff, knowledge of this.

Mr. Duque: We already have shown that it was brought home to the plaintiff, your Honor, by the introduction of Plaintiff's Exhibit No. 2.

The Court: You are relying upon the written statements on the reverse side of the order, are you, the invoice?

Mr. Duque: I am relying on that; but I am attempting to rebut any alleged other practice which may have lulled the plaintiff into a sense of security, or done something to [276] them.

The Court: Well, the most that the plaintiff has here is the testimony, as I recall it, that a certain representative of the defendant told the plaintiff certain things with respect to what the defendant did with dies. Is that correct?

Mr. Mahoney: That is correct, your Honor.

The Court: Now, if that was a departure from practice, it would be immaterial unless that practice had been brought home to the plaintiff. And any practice would not rebut, would it, the statement made, if it was made?

(Testimony of James M. Hairston.)

Mr. Duque: Well, the statement obviously was not made by Mr. Hairston or anybody else of the defendant, and that's set forth in all the affidavits.

The Court: Very well. Then that serves as rebuttal to the evidence that there was such a statement made—

Mr. Mahoney: Your Honor, I will say nothing.

The Court: —but the practice would not, as Mr. Mahoney points out.

Do you have something to say?

Mr. Mahoney: I will say nothing about it. We will let it stand.

The Court: Sustained.

Q. (By Mr. Duque): Mr. Hairston, referring back to Exhibit No. 24, does this estimate include any sales expense? A. No, sir. [277]

Q. Are there any other costs that are omitted from the estimate?

A. Yes, sir. The only costs that are included here are the so-called direct costs, which includes material and direct labor.

Q. What are the other costs that are customarily included?

A. All overhead items, beginning with indirect labor; light, power, depreciation, supervision, miscellaneous supplies, payroll taxes, insurance, employee benefits, fringe benefits. Likewise, it is normal to apply your selling and administrative—or, general and administrative expenses to a production line. These are not indicated in this report.

The Court: "This report" being exhibit—

(Testimony of James M. Hairston.)

Mr. Duque: Exhibit 24, your Honor.

Will your Honor bear with me for a moment?

The Court: Yes.

Mr. Duque: No further questions of this witness, your Honor.

Cross-Examination

By Mr. Mahoney:

Q. Mr. Hairston, have you made any estimate as to the probable additional costs which should be added to the figures which appear in Plaintiff's Exhibit No. 24? [278] A. Yes, sir. I have.

Mr. Mahoney: Mr. Duque, would you kindly produce those notes?

The Witness: Those that I just—the yellow sheets, Mr. Duque?

Mr. Mahoney, they are stated in that work sheet as percentage of net sales, since your records do not permit any other basis of allocation of overhead and these other expenses.

Mr. Mahoney: Your Honor, at the present time the question of materiality of the introduction of the additional figures such as overhead and selling costs is raised, and if your Honor desires we can produce the evidence on behalf of the plaintiff as to such figures. But we think the measure here is the actual cost, the actual figure which if the direct labor and the direct costs of raw materials, plus the assembly thereof, including the packaging of the product as it leaves the plant.

(Testimony of James M. Hairston.)

Now, if your Honor feels that as a matter of law the overhead figures should be presented to state a complete case on cost to the plaintiff of each door, then we can present these figures. And we will also present, without being bound thereby, the tentative figures arrived at by Mr. Hairston.

The Court: Are you willing to accept these figures, subject to check? [279]

Mr. Mahoney: Well, your Honor——

Q. (By Mr. Mahoney): Mr. Hairston, these are merely estimates, aren't they?

A. Those based on your financial statement for the period of January 1st through February 28th, your profit and loss percentage figures, which I assume to be true and correct, as a normal basis for approaching it due to the fact that your records, your cost records do not segregate your costs in any way that I could compare or make any analysis of the cost to be allocated to that particular product.

Mr. Mahoney: Well, you see, this is an important point, your Honor, because the testimony of the plaintiff would indicate that this product took a surprisingly small percentage of the entire overhead of the Panaview company. And as you can see from the total labor costs it was a relatively small expenditure. There was a relatively small expenditure of time and labor and relatively small space for production of the large number of doors. So the overhead figure is not necessarily to be reflected from the financial statement because, as Mr. Hair-

(Testimony of James M. Hairston)

ston says, there was a commingling of the products on the financial statement. Is that correct?

The Witness: Absolutely no segregation.

The Court: Well, it would be a matter, in any event, of arbitrary allocation of overhead, would it not?

The Witness: Yes, sir. To my knowledge there is no [280] firm and concrete method of allocating certain overhead items.

Mr. Mahoney: I think the testimony of Mr. Pinson would be indicative of the manner in which this arbitrary allocation was made.

The Court: Would you want to state it percentage wise what proper business and accounting practice would call for in the way of allocation of overhead?

The Witness: Yes, sir. I can give you one of the accepted practices which—

The Court: The practice, in your opinion, that should be applied here.

The Witness: A normal method found, I believe, would possibly be applied on a pro rata basis against the sales dollar—your plant overhead generated within the plant or in the manufacturing operations normally are related to direct labor and/or direct labor and materials. Certain direct overhead items could very easily be allocated. But their particular cost system or accounting system does not furnish any basis at all for making any allocation—

The Court: Of general overhead?

The Witness: Of general overhead.

(Testimony of James M. Hairston.)

Q. (By Mr. Mahoney): Is it true, Mr. Hairston, in an established plant there could remain fixed such things as rent, lights and other factors such as that when a new product [281] was brought in and that the allocation of such fixed factors would not alter the fact that there had been no increase in these overhead figures?

A. In a general manner your statement is probably correct. But normally, in bringing in a new product, it also requires additional tooling and equipment and other items that in some instances become fixed assets; also, probable additional supervision.

Mr. Mahoney: Then, your Honor, I think that rather than accepting this estimate of the defendant the plaintiff should probably put on direct testimony as to the overhead situation here.

The Court: You wish to recall Mr. Pinson for that purpose?

Mr. Mahoney: Yes. We will recall Mr. Pinson.

The Court: Any further questions of Mr. Hairston?

Mr. Mahoney: One moment, your Honor.

Q. (By Mr. Mahoney): Mr. Hairston, referring to page 4, lines 13 to 23, of your affidavit—

A. I am sorry. I can't find it quickly here.

Mr. Mahoney: Don't hurry yourself.

The Court: Mr. Clerk, will you assist the witness?

(Whereupon, the document was handed to witness.)

(Testimony of James M. Hairston.)

Q. (By Mr. Mahoney): It's page 4, lines 13 to 23.

A. What page was that, Mr. Mahoney? [282]

Q. Beginning on page 4, lines 13 to—well, lines between 12 and 13 and between 22 and 23.

A. Yes, sir.

Q. Now, in this paragraph you state,

"* * * it is not true that extrusions were diverted by us * * *"

And by "us," I presume you mean the extrusion department of the Reynolds Metals Company. Is that correct?

A. Yes.

Q. "* * * to Windsor Supply, Inc., or any other competitor of plaintiff."

On what do you base that statement?

A. On the records in my location.

Q. Do you have those records with you?

A. Yes, sir. I have a considerable number here that I believe I can substantiate that statement.

Q. Were you supplying Windsor and Panaview at the same time with these extrusions?

A. In effect, yes. We were supplying the parts. We were supplying the parts division, who, in turn, were supplying Windsor—

Q. In other words, as an internal operation, the extrusions went from the extrusion department to the parts division for Windsor—

A. Yes, sir. [283]

Q. —and the extrusions went out directly from the extrusion department to Panaview for Panaview, is that correct?

A. Yes, sir.

(Testimony of James M. Hairston.)

Q. Now, how do you explain then that during the period extended generally from the initiation of the sales and shipment of extrusions by Reynolds to Panaview there were numerous times when incomplete orders were sent, incomplete to such an extent that complete doors could not be shipped in KD condition by Panaview?

A. To answer your question, sir, I will have to give a little explanation of my system and try to make it as briefly as possible. It is generally contained in my affidavit here. But immediately upon scheduling an order on an item to be produced in our plant, we produce a master lot ticket which identifies that product with the customer order item. Once that product or material is assigned to that lot ticket it must follow through our normal operations as laid out on the lot ticket until it is ultimately completed and shipped to the customer. It is virtually impossible for us to cross-supply once the product is going through the plant. And if it was cross-supplied it would have to be noted on our document that we use to attempt to control production in our plant. We have approximately 8,000 products going through our mill at any one time. We are on a job lot cost [284] system, or job lot system, and we process materials by batches and in order to maintain any control at all we must keep those batches together.

Q. Then would you say that by the acceptance of orders from Windsor Supply Company and the

(Testimony of James M. Hairston.)

fact they had a prior lot ticket on them the orders for Panaview were necessarily delayed?

A. No, sir.

Q. In other words, if there were an order for Windsor Supply Company in the plant and it was being processed, you would immediately remove that order from process and put the Panaview order through?

A. I am sorry. I don't believe you understand our operation, sir. That would not affect the timing or the delivery schedule of any other order or item in our plant. We can't simply remove an item from the schedule and—

Q. If you can't remove the prior Windsor order from the schedule, if it is being run through the plant, then that means that the Windsor order has to be completed before the Panaview, the production on the Panaview order is initiated?

A. That is not exactly true, either.

Q. Is it true in part?

A. Yes, I am sure that that could happen.

Q. In what respect is it not true? [285]

A. Well, a product such as these that we are speaking of must go through about five different operations. Some of it is timed by the nature of the operation requiring a certain amount of time. It does not mean, however, that the two particular—assuming we have an order for a die section from Windsor and a section from Panaview, we have more than one machine which would handle that one order. We have a multiple grouping of equip-

(Testimony of James M. Hairston.)

ment through which either of these sections or orders could be processed, either simultaneously or in consecutive order or whatever way they happen to hit in the mill schedule.

Q. In other words, though, it could happen, using your own phraseology in a situation, that an order for Panaview could be delayed because of the fact that an order for Windsor was already in the plant?

Mr. Duque: I object to that as being purely hypothetical.

The Court: It is argumentative.

Q. (By Mr. Mahoney): You have previously stated that it was partly true that an order for Panaview could be delayed by the fact of the lot ticket situation on the passage of orders through the plant. Is that correct?

A. Yes, only under some very limited circumstances.

The Court: Do you have more than one set of these extrusion dies? [286]

The Witness: Yes, sir.

The Court: That were built for Panaview?

The Witness: In this particular case we do, sir.

The Court: You had more than one set of them?

The Witness: Yes. Except for two of their dies, or sections, we have duplicated each of them. And in some instances more than two.

Q. (By Mr. Mahoney): These bear Panaview's die numbers?

(Testimony of James M. Hairston.)

A. They bear a die number that is the same as the Panaview, yes.

Q. So there is no distinction whatsoever between these sets of dies, as to die number, which originally appeared on the Panaview order?

The Court: The reason I asked the question if there were only one set of dies is that I should assume that they were being used on one order, if that were so, they couldn't be at the same time used on another order. But if you had more than one set of dies, would there be any reason why the order of one customer would delay the other?

The Witness: None whatsoever. And in addition, in our normal method of operation, if we can group orders for processing where one of our major expenses is setting up the die in the press—it requires approximately an hour's time, which is a critical operation, and if there is any possible way of grouping orders it would act to their [287] benefit. We would try to run as many pounds through that particular die as it was possible to do.

Q. (By Mr. Mahoney): Can you explain then how during the time Reynolds Metals Company was selling extrusions or shipping extrusions to its parts division for further work and shipping extrusions to Panaview, it was necessary for Reynolds Metals Company to ship incomplete orders?

A. Yes, sir. That seems to be one of the plagues of the extrusion industry. Our promise date performance in our plant, up until last month, has been 60 per cent meeting the original promised date.

(Testimony of James M. Hairston.)

Now, there are many reasons that cause that. Failure of the product somewhere through its processing. Maybe it's processed all through down to the final inspection and we find that it doesn't meet physical test requirements or other tolerances that are specified. In that instance the material has to be scrapped and we have to start over. It is a regrettable thing, but it is normal.

Q. Now, when you say in your affidavit, “* * * it is not true that extrusions were diverted by us to Windsor Supply Company, Inc., * * *” what do you mean?

A. Well, I assume that the “diversion” or at least my implication of “diversion” means that any instance where we may have had in the mill material being processed against a Panaview order and then for some reason diverted—taken [288] from a particular lot and assigned to the Reynolds Metals Company for Windsor.

Q. Do you know of your own knowledge whether, at the time Panaview was receiving incomplete shipments, Windsor was receiving complete shipments of extrusions from the parts division?

A. That is a difficult question to answer directly. I would have to make a certain assumption, based on our normal operation, that they were suffering shortages as any other—

Q. But you don't know they were suffering shortages.

A. Yes. I think I can indicate or show that

(Testimony of James M. Hairston.)

from the shipping records against the parts division, or the material ordered from Windsor, that it was being shipped in generally the same quantities or percentages of the original order as was Panaview. The items were not being shipped complete at the day or week promised. There were multiple shipments against each item. And from that I can only point out that that indicates a normal—

Q. Well, do you know whether when a shipment was shipped to Panaview and during the same period a shipment was shipped to Windsor that there wasn't present in a Windsor order extrusions which were lacking from the Panaview order, thus rendering the Panaview order incomplete?

A. It is entirely possible that would be so. I point out again that we have some 8,000 products going through the [289] mill, and we may have five or six of the identical product in the shipping department being shipped to different customers. We make no effort to try, or to say, "We will take from this customer and let him go completely without so we can fill this order." We ship them as the master lot ticket indicates that order is to be shipped. All of our case tickets are prepared with that information on it.

Mr. Mahoney: That will be all.

Mr. Duque: No redirect examination.

The Court: You may step down, Mr. Hairston.

(Witness excused.)

Mr. Duque: Mr. Gunderson, will you take the stand, please, sir?

RAYMOND GUNDERSON

called as a witness on behalf of the defendant, being first sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Raymond Gunderson.

Direct Examination

By Mr. Duque:

Q. Mr. Gunderson, what is your occupation, sir?

A. Self-employed.

Q. And were you at one time employed by the —well what was your last prior employment?

A. I was employed by the Windsor Manufacturing Company? [290]

Q. How long were you employed by them, over what period of time?

A. Approximately two years.

Q. In what capacity? A. As president.

Q. And in the capacity as president of the corporation did you have knowledge of its sales and operating problems? A. I did.

Q. During that period of time was Windsor Manufacturing Company doing business with the plaintiff in this action, Panaview?

A. Yes, sir.

Q. Will you tell us what the nature of your business dealings were with Panaview during that period?

(Testimony of Raymond Gunderson.)

A. The Panaview company manufactured products under the Windsor Manufacturing label which we offered for sale to our customers.

Q. In other words, Panaview would furnish you with a complete knocked-down door which you would buy from them and then you would put your label on it and sell it to your customers?

A. Yes, sir.

Q. Was one of your customers the W. P. Fuller Company? A. Yes, sir.

Q. To your knowledge, during that period of time was [291] W. P. Fuller a customer of the Panaview company? A. No, sir—

Q. It was not? A. —to my knowledge.

Q. Now, during this same period of time was your company, Windsor Manufacturing, doing business with the Reynolds Metals Company?

A. No, sir.

Q. You at no time did any business with the Reynolds Metals Company? A. No, sir.

Q. Have you ever been connected with any organization that did business with the Reynolds Metals Company? A. Yes, sir.

Q. Would you please state the name of that organization?

A. I will have to qualify it just a little bit.

Q. Please do.

A. Prior to Windsor Manufacturing, I was employed by Windsor Supply Company, and Windsor Supply Company, I believe over the years has done

(Testimony of Raymond Gunderson.)

business with Reynolds Metals Company. So that would be one case.

After leaving Windsor Manufacturing as an employee and becoming assistant to the man who owned Windsor Supply Company, I was, well, semi-remotely connected with their [292] operations and Windsor Supply Company was certainly doing business with the Reynolds Metals Company.

Q. When you say you were assistant to the man who owned Windsor Supply Company, to whom do you refer? A. Mr. C. A. McLin.

Q. And he was the principal owner of the Windsor Supply Company and also Windsor Manufacturing Company? A. That is correct.

Q. At any time during your employment either with Windsor Supply or with Windsor Manufacturing Company, or as assistant to Mr. McLin, do you know of any occasion when Reynolds Metals Company sold to either of those corporations any assembled knocked-down doors ready for resale?

A. No, sir.

Q. You do not know of any such occasion?

A. I do not.

Q. Now, Mr. Gunderson, it has been testified here that at one time you and Mr. McLin and Mr. Reznick, who is one of the operators of the plaintiff in this case, had a conversation as, I believe it was Panaview's office—no, it was in Pasadena in late 1954. Do you recollect being in such a meeting with Mr. McLin, Mr. Gunderson, and Mr. Reznick?

A. I do.

(Testimony of Raymond Gunderson.)

Q. Now, it has been testified here that, in substance [293] Mr. Reznick—also present was Mr. Pinson, I believe, is that correct?

A. Yes, I believe he was there.

Q. Now, it has been testified here that Mr. Reznick told Mr. McLin that he would have to pay their past due account right away. And then Mr. McLin, in substance, told Mr. Reznick that he didn't have to do business with Panaview and that he would take measures to protect himself, and that in two weeks he could have another source of supply of doors.

Mr. Mahoney: Your Honor, the phraseology of the question does not appear to be in conformity with the facts. My recollection of the testimony is that Mr. McLin is reported to have stated that he had taken measures to protect himself.

Mr. Duque: Maybe I can do it by asking the witness what the conversation was.

The Court: That would be the proper way.

I assume this is not an impeaching question for which a foundation was laid as to the witness. It is offered only to impeach him by remarks and not by showing a prior inconsistent statement.

Mr. Duque: That is correct.

The Court: Why not ask him what the conversation was.

Q. (By Mr. Duque): Will you tell us what took place at that conversation at that meeting, what was said by Mr. McLin and what was said by Mr. Rez-

(Testimony of Raymond Gunderson.)

nick and you and Mr. Pinson, to [294] the best of your recollection.

A. Mr. Reznick and Mr. Pinson appeared at that meeting with a statement which showed that Windsor Manufacturing Company owed X amount of dollars—it escapes me for the moment, but I believe it was somewhere in the neighborhood of \$13,000—and for which they asked payment. It was Mr. McLin's contention that certain credits were forthcoming from the Panaview company and that until they had been adjudicated one way or the other I think he said he would not pay the bill.

However, he did indicate that he would like to continue doing business with Panaview through Windsor Manufacturing Company on the basis under which they had operated in the past. And he did make the statement, to my recollection, that because of certain doubts that he had about the ability of that arrangement to continue he had taken steps to protect himself and that he had placed sizable orders for material which could be used to construct a sliding patio door; and that as far as he was concerned he had never particularly wanted to be in the sliding door business from a manufacturing point of view, so that if he and Mr. Reznick could agree on some program for the future he would gladly release whatever metals he had contracted for and resume the operation as it had previously been worked.

Q. (By Mr. Duque): Did he at any time in that conversation [295] ever tell Mr. Reznick or

(Testimony of Raymond Gunderson.)

anybody else that he intended to buy knocked-down doors ready for the retail market from Reynolds Metals Company?

Mr. Mahoney: Your Honor, this question is leading and suggestive.

The Court: Overruled.

The Witness: Terminology, now, I guess is important. I think Mr. McLin said, "We are not going to be put out of the sliding door business, and we will manufacture sliding doors."

Whether he said that he would buy extrusions with secondary operations performed upon them is something that I cannot remember.

Mr. Duque: That is all. No further questions.

Pardon me, just a moment. I have one further question.

Q. (By Mr. Duque): At any time that you were associated with Windsor Manufacturing or with Windsor Supply or Mr. McLin, did Reynolds Metals Company ever disclose to you or to anybody connected with any of those organizations any of the designs of Panaview in connection with their Panador, or any other door?

A. I can't speak for the rest of those organizations. I can only speak for myself. But never were they disclosed to me.

Q. And so far as you know of your own knowledge never [296] to anyone else in your organization? A. That's right.

Mr. Duque: That is all, your Honor.

The Court: Any cross-examination, Mr. Mahoney?

Mr. Mahoney: No cross-examination, your Honor.

The Court: You may step down, Mr. Gunderson.

(Witness excused.)

Mr. Duque: Your Honor, may we have a short recess before determining whether we are going to rest at this time?

The Court: Very well. We will take the morning recess at this time of five minutes.

(Short recess.)

Mr. Duque: The defendant rests, your Honor.

Mr. Mahoney: Your Honor, plaintiff would request that Mr. Pinson be returned to the witness stand to give his testimony on the question of overhead.

The Court: This is reopening of the case in chief?

Mr. Mahoney: Reopening of the case in chief, your Honor.

The Court: Very well. You may recall Mr. Pinson for further direct examination on the case in chief of the plaintiff.

LOUIS PINSON

a witness called on behalf of the plaintiff, having been previously sworn, resumed the stand and testified as follows:

The Clerk: Just be seated. You have been sworn. [297]

Direct Examination

By Mr. Mahoney:

Q. Mr. Pinson, do you have with you at the present time the records relating to other factors than direct cost which would constitute overhead allotted to the manufacturer of the Panador sliding door?

A. Yes, sir. I have the profit and loss statement for this critical period—for a period within the critical period.

Q. Now, from that statement could you ascertain the cost of tooling?

A. We have not separated our tooling costs for the Panaview, Panador and Panaview window, for those three products. They are all grouped as burden overhead, tooling burden for the entire operation.

Mr. Duque: May I inquire of the counsel, is the witness testifying from a profit and loss statement? If so, may I see it before he testifies?

Mr. Mahoney: What we are trying to ascertain here is whether this particular profit and loss statement would enable him to give accurate testimony as to overhead before we—

(Testimony of Louis Pinson.)

Q. (By Mr. Mahoney): Would your profit and loss statement then enable you to break down the cost of tooling on the Panador as distinguished from the other items?

A. No, it would not. [298]

Q. But do you have records available to you at your plant and in your offices which would enable you to do this?

A. Only the most exhaustive search would enable us to segregate the tooling costs of the Panador from all of our tooling costs.

Q. Can you estimate from your own knowledge what the costs of tooling for the Panador were?

Mr. Duque: If the Court please, I object to the question on the grounds it calls for the conclusion of the witness, and is speculative. There are no records here. He says that he hasn't got any records and that it would require an exhaustive search. So I would assume that his estimate would be a speculative estimate, or a guess.

The Court: Does the profit and loss statement show an expense item "cost of tooling" or "cost of all tooling"?

The Witness: Yes, your Honor.

The Court: Do you have an opinion, from your experience, as to what portion or percentage of the total would properly be attributable to the Panador tooling?

The Witness: Yes, your Honor.

The Court: What is that opinion?

(Testimony of Louis Pinson.)

The Witness: I would have to derive this opinion from our—

The Court: You may explain it later.

Let me ask you this first: In carrying on your accounting [299] procedures, have you in the past allocated a certain portion of the tooling cost to the Panador and to other products?

The Witness: The allocations to our journal?

The Court: I mean, have you done that in the past? Have you sat down to see how much you made on the Panador operation, for example, and said, "We will allocate so much percentage of the tooling cost"?

The Witness: No, your Honor.

The Court: You have never done that?

The Witness: No.

The Court: Now, my question is, do you have an opinion as to what proportion or percentage of the total tooling cost should properly, under normal businesslike and proper accounting procedures, be allocated to the Panador tooling?

The Witness: Yes, your Honor, I have such an opinion.

The Court: That is, to the Panador tooling cost. What is that?

The Witness: My opinion is that approximately 20 per cent of our total tooling cost as reflected—not in our profit and loss statement, since this statement does not cover the period at which time we did our main tooling—but 20 per cent of our total

(Testimony of Louis Pinson.)

amount of our capital investment in tooling is represented by the Panador line.

The Court: Well, you mean by that to say that in your [300] opinion one-fifth of all the tooling costs are incurred in the tooling costs on the Panaview door?

The Witness: On the Panador.

The Court: The Panador.

The Witness: Yes, your Honor. I believe that would be a reasonable estimate.

The Court: Is that your best estimate?

The Witness: It is the best one that I can make under the limited time available.

The Court: You may proceed, Mr. Mahoney.

Q. (By Mr. Mahoney): Now, Mr. Pinson, when you initiated the manufacture of the Panador, did you acquire any new buildings to accommodate this operation? A. No, we did not.

Q. How did you handle the manufacture of the Panador in your already established building?

A. We used the Panador through the same flow lines that our Panaview door followed. In other words, it occupied the same physical space within our plant. And when there wasn't sufficient "down" time of our machines during the daytime to accommodate the full number of Panadors we wished to run, we set up a second shift.

Q. Now, what about your percentage of sales expenses on the Panador?

A. Our sales expense for the Panador line was very [301] minimal. Our principal customer—

(Testimony of Louis Pinson.)

The Court: What proportion, what percentage of the total sales expense. Is that what you want?

Mr. Mahoney: That is correct.

The Court: Just ask him that. I will permit him to answer that.

Q. (By Mr. Mahoney): What percentage of the total sales expense which was incurred by Panaview was attributable to the Panador? Can you determine that from the profit and loss statement?

A. Again, let me point out to your Honor that it would be difficult to—

The Court: I understand it is difficult. Do you have an opinion?

The Witness: Yes, I do.

The Court: What is that opinion?

The Witness: My opinion is that it would represent approximately 10 to 15 per cent of our sales expense.

The Court: Of the total?

The Witness: Of the total sales expense.

The Court: I want to be clear. By that I understand you to say that it is your opinion that of the total sales expense incurred by the plaintiff 15 cents on the dollar would be incurred in promotion of sales of the Panador?

The Witness: That is true, your Honor. [302]

Mr. Mahoney: Excuse me a minute.

The Witness: May I amend that last answer just for the purpose of clarification? Naturally our sales expenses and all of our overhead burden expenses are much higher on the first group of doors

(Testimony of Louis Pinson.)

we produce, or the smaller number of doors we produce. We have a total, approximately, of 6,000 doors produced during this particular period under discussion, and naturally these expense figures must be higher for the first group of doors and would be considerably lower, perhaps, for the last group of doors. I tried to strike an average figure for the entire 6,000 units.

The Court: Is the profit and loss statement upon which the witness bases his estimate in evidence?

Mr. Mahoney: We are going to attempt to put it in, your Honor.

Would you please mark this for identification as Plaintiff's Exhibit No. 26?

(The exhibit referred to was marked Plaintiff's Exhibit 26 for identification.)

Q. (By Mr. Mahoney): I show you Plaintiff's Exhibit No. 26 for identification, which includes a statement of assets and liabilities, and a profit and loss statement from the date of January 1, 1955, to February 28, 1955, of the Panaview Door & Window Co., and ask you if you are familiar with that, with Plaintiff's Exhibit No. 26 for identification? [303]

A. Yes, I am. I am familiar with it.

Q. Now, from the figures which are set forth in the profit and loss statement, can you derive, on the basis of your opinion as to percentage, the approximate overhead on the Panador sales?

Mr. Duque: If the witness is to testify from this

(Testimony of Louis Pinson.)

document, may I examine him on voir dire as to who made it and what it is?

The Court: Is there any question about the authenticity?

Mr. Duque: I don't know, your Honor. I don't know whether it was made by Panaview or by a certified public accountant or by an outside accountant. If it was made by Panaview it is obviously a self-serving document.

The Court: You may examine him on voir dire.

Mr. Duque: Mr. Pinson, the document that you hold in your hand, Exhibit 27 for identification—

The Court: That is No. 26.

Mr. Duque: I beg your pardon. Exhibit No. 26 for identification. Could you tell us by whom that was made?

The Witness: Yes, sir. This was made by—this document came out just at the time we were changing our auditors. This was either the last document made by our previous auditor, Mr. Henry Serlin, S-e-r-l-i-n, a CPA of Los Angeles, or it was the first statement prepared for us by Mr. Harry Isenberg of David Belinkoff & Associates, Los Angeles. [304]

Mr. Duque: Thank you, your Honor.

Mr. Mahoney: Will the reporter please read the question previously directed to the witness?

(Question read.)

The Court: That is just a mathematical operation, isn't it?

(Testimony of Louis Pinson.)

Mr. Mahoney: Yes, your Honor.

The Court: It would be 15 per cent of the total sales cost shown on the profit and loss statement, would it not?

Mr. Mahoney: That is correct.

The Witness: That is exactly the way I would approach it, your Honor.

The Court: Well, let the lawyers do the arithmetic. Or, you can do it for them later on.

Mr. Mahoney: Your Honor, I now offer in evidence Plaintiff's Exhibit No. 26 for identification.

Mr. Duque: To which we object, your Honor, on the grounds that it is incompetent, irrelevant and immaterial; doesn't tend to prove any of the issues in this case, and no proper foundation has been laid. And it does not in any way prove the element of damages in this case.

The Court: Do you wish the accountant brought here?

Mr. Duque: Pardon me?

The Court: Do you wish the accountant brought here to say it was prepared by him? [305]

Mr. Duque: I don't mean that.

The Court: What foundation are you objecting to?

Mr. Duque: That is a statement, your Honor, of two months only. It is not a statement of the entire period.

The Court: That goes to its weight, doesn't it?

Mr. Duque: I suppose it would, yes.

(Testimony of Louis Pinson.)

The Court: If there is no objection to the authenticity or—

Mr. Duque: I do not object to that.

The Court: Very well. The objection will be overruled. Exhibit No. 26 for identification is received in evidence.

(The exhibit referred to was marked Plaintiff's Exhibit 26 and received in evidence.)

Mr. Mahoney: Your Honor, we are faced here with the problem of evidently having to produce these voluminous records once again that Mr. Pinson has referred to, and, as on the question of the cost, the direct cost of producing the Panador, the summary prepared by Mr. Pinson was received in evidence, and this also poses the question as to whether, in order to carry the burden of proving our overhead and to satisfy defendant in this regard, we must produce all of our records in the period extending from September, or August, 1954, to and including the present time.

The Court: Well, Exhibits 24 and 25 have gone in without objection, have they not? [306]

Mr. Mahoney: Those show sales—

The Court: Exhibit 24 shows production costs and Exhibit 25 the sales summary.

Mr. Mahoney: And Exhibit 26 shows the percentage of overhead attributable to those sales in a specific period, and could be prorated through the entire period.

(Testimony of Louis Pinson.)

The Court: Don't you have a statement showing your profit and loss covering the period in question?

Q. (By Mr. Mahoney): Do you have a statement showing the profit and loss for the entire period extending from August, 1954, to and including the present time in your records?

A. We have a statement ending June 30, 1955; from January 1, 1955. I can't recall from my memory whether I have broken up the 1954 statement to extend from the particular date in August through December 31st.

The Court: Can you do so?

The Witness: Not within reasonable limits, unless I should happen to have one. In other words, I couldn't make one. If I have such a statement in my possession in my records, I could produce it, yes.

The Court: Do you have it with you here in court?

The Witness: No, I do not.

Mr. Mahoney: Could you obtain that record before this afternoon, the January to June profit and loss statement?

The Witness: Yes. [307]

Q. (By Mr. Mahoney): Could you produce the January to December, 1954, profit and loss statement? A. The 1954—the entire year?

Q. The entire year. A. Yes.

Q. Mr. Pinson, is it your opinion that the amount of tooling which was purchased, as distinguished from machines, Panaview for the Panador

(Testimony of Louis Pinson.)

project was a large or small amount of tooling in dollar value?

A. I am sorry. I don't quite get the question.

Q. Was the amount of tooling purchased by Panaview for production of the Panador in dollar volume a large or small amount of tooling?

A. It was a relatively small amount of tooling in dollar volume.

Q. And was this tooling adapted for use on the machines and other equipment such as fixtures which were already in possession of Panaview?

A. That is true.

Q. And which were utilized on the other products of Panaview? A. That is true.

Q. So that did you then have to make any significant capital investment in machines for Panador Manufacturing? A. No, we did not. [308]

Q. And your tooling costs were relatively low?

A. The tooling costs were relatively low.

Q. What is your opinion as to the sum total of those tooling costs?

A. I'd rather not give the dollar figure.

Q. What was the range? Low in the four figures, or high? A. Low in four figures.

Q. Now, on your sales to Windsor Manufacturing Company, were there any significant sales costs involved in there?

A. There were virtually no sales costs involved with the Panador because we had already established modus operandi with the Panaview and merely carried that on.

(Testimony of Louis Pinson.)

Q. Now, when you initiated your sales directly to distributors were these the same distributors which had already been established for the other products of Panaview?

A. Yes. Our regular distributors carried our additional Panador line, and we did not add any special distributors to carry this line.

Q. Was there considerable initial or continuous sales expense therefor allotted to the sales of the Panador directly to your own distributors?

A. There was almost no sales expense allotted to Panador, either in this respect or any other.

Q. Did you maintain the same office force in the [309] offices of Panaview as you did after you started manufacturing Panador as you did before?

A. Yes, sir.

Q. What is your opinion as to the increase in overhead which you would have encountered if you had had the opportunity of manufacturing 5,000 more Panadors in the period extending between November, 1955, and up to the present time?

The Court: November, 1955?

Mr. Mahoney: 1954 to the present time.

Mr. Duque: To which we object, your Honor, on the grounds that it is conjectural and speculative.

The Court: Where does the 5,000 figure come from?

Mr. Mahoney: The 5,000 figure is the stipulated figure of component parts for the doors which were shipped by Reynolds to Windsor.

The Court: You are asking the witness to as-

(Testimony of Louis Pinson.)

sume that, that plaintiff had manufactured those doors during the specified period stated, November, 1954, to date?

Mr. Mahoney: That is correct.

The Court: What is your question, his opinion as to what?

Mr. Mahoney: My question is directed to whether there would have been a substantial increase in overhead, in the opinion of the witness, if they had manufactured these additional doors. [310]

The Court: I don't know what you mean by "substantial."

Q. (By Mr. Mahoney): Would there have been an increase?

Mr. Duque: To which question I still object on the grounds that it is speculative. There is no evidence that they could have manufactured an additional 5,000 doors.

Mr. Mahoney: Mr. Pinson has previously testified that they had the facilities for the manufacture of such an additional number of doors.

Mr. Duque: I don't recollect any such testimony.

The Court: I don't recall it, either.

Could you have, during the period from 1954 to the present time, could the plaintiff have manufactured, or did the plaintiff have the facilities to manufacture 5,000 additional Panadors?

The Witness: Yes, your Honor.

The Court: Do you have an opinion as to what,

(Testimony of Louis Pinson.)

if any, increase in overhead would have been incurred—

The Witness: Yes.

The Court: —if the plaintiff manufactured 5,000 Panadors during the period November, 1954, to date?

The Witness: I have an opinion.

The Court: What is that opinion?

The Witness: My opinion is that the increase in overhead would have been almost negligible.

The Court: Give us a percentage or an amount. [311]

The Witness: Less than two per cent, your Honor. I am talking there in terms only of additional electricity and minor items there.

The Court: Would you say one and one-half per cent, or one and three-fifths per cent?

The Witness: I would say in the neighborhood of two per cent.

The Court: There has to be a definite opinion.

The Witness: I have.

The Court: We can't compute something when you say "about."

The Witness: My opinion then is that two per cent would be approximately our overhead.

The Court: Would that be it?

The Witness: Yes.

The Court: You see, you can't multiply approximately something by something, can you?

The Witness: Not very well, your Honor.

Mr. Mahoney: May we release Mr. Pinson, sub-

(Testimony of Louis Pinson.)

ject to recall to present in evidence the profit and loss statements which he has indicated can be obtained by him prior to the initiation of the afternoon session after the noon recess?

The Court: Do you wish to cross-examine him on his testimony up to now?

Mr. Duque: I probably will after he gets through. [312]

Mr. Mahoney: Do you wish to proceed now or wait until we produce those additional statements?

Mr. Duque: If he is going to put some more statements in, I would certainly like to have those to look at. In the first place, I understand that you are going to attempt to introduce the complete 1954 statement, to which I am going to object on the grounds it doesn't cover any issue in this case. Your costs, and everything else, could have gone up and down and all over the place during that period of time.

The Court: What do you deem to be the period. You just objected because the other period wasn't broad enough. What period do you wish covered?

Mr. Duque: From the end of 1954 through—

The Court: You mean as of December 31, 1954?

Mr. Duque: Yes.

The Court: Then the first six months of 1955 would cover it, wouldn't it?

Mr. Duque: Yes.

Q. (By Mr. Mahoney): Mr. Pinson, can you produce such a statement? A. Yes.

Q. Will you, upon leaving the stand, go to your

(Testimony of Louis Pinson.)

offices and obtain that statement? A. Yes.

Mr. Mahoney: Very well, you are released, subject to [313] recall.

The Court: Just a moment. Do you have any other rebuttal?

Mr. Mahoney: Yes, I do. I have Mr. Grossman in rebuttal to the testimony of Mr. Meyer.

The Court: Very well. Mr. Pinson, you may be excused, and return at 2:00 o'clock with the requested documents.

(Witness excused.)

The Court: You may recall Mr. Grossman in rebuttal.

ABRAHAM GROSSMAN

called as a witness by the plaintiff in rebuttal, having been previously sworn, resumed the stand and testified further as follows:

Direct Examination

By Mr. Mahoney:

Q. I show you Plaintiff's Exhibit No. 6 and Plaintiff's Exhibit No. 8; Plaintiff's Exhibit 6 being the original of your drawing presented by you to the Reynolds Metals Company, and Plaintiff's Exhibit 8 consisting of a sheaf of die prints submitted to you for your review by the Reynolds Metals Company.

Mr. Grossman, when you have previously testified that you placed on the drawing, Plaintiff's Exhibit

(Testimony of Abraham Grossman.)

No. 6, the dimensions which are shown thereupon, can you explain why you did not place upon that drawing the tolerances which are found in such exhibits included in Exhibit 8 as the 5X [314] drawing—is that correct? A. 4X.

Q. ——4X drawing.

A. The reason no tolerances were noted on my drawings is that all dimensions of a tolerance is given by the aluminum company as a commercial tolerance, and they are not noted on the drawings sent in for approval for the processing of a die, and so forth. But it is understood that if dies are ordered, or material through those dies is ordered with commercial tolerances that all of the dimensions, according to a certain formula for angles or solid dimensions of any particular dimension, all carry that commercial tolerance.

Now, unless there is a special notation, all of the commercial tolerances being equally divided between the plus and minus side, but if there is a special notice it means that the same commercial tolerances are unequally divided by the approval of the customer.

Now, is this, in your experience, the standard practice in the aluminum industry as a whole?

Mr. Duque: I object on the grounds that I thought we were not going into standard practices and customs in the aluminum industry.

Mr. Mahoney: The custom and usage which were stipulated as being removed from the issues in this case were, Mr. Duque, [315] custom and usage

(Testimony of Abraham Grossman.)

where the defendant's custom and usage defenses on the contract and the practice of the contract—

Mr. Duque: I was under the impression it was plaintiff that pleaded in his complaint the custom and usage and breach thereof.

The Court: This is an auxiliary issue that has risen, and not an issue raised in the pleadings at all.

Mr. Mahoney: This phase is not raised in the pleadings. It is true, as Mr. Duque states, that there was a pleading as to custom and usage in regard to the handling of confidential disclosures.

The Court: I would assume that in any production such as this, unless it is precision machine work, that there were tolerances. Is there any issue as to that?

Mr. Duque: I don't believe so, your Honor.

The Court: I suppose that in anything that the defendant manufactures the defendant insists that it be allowed certain tolerances in the production of it, unless, as I say, it is precision machine work.

Mr. Duque: I would imagine so, not being a tooling engineer.

Mr. Mahoney: Your Honor will then take judicial notice of the fact that in any extrusion process or any manufacturing process it is customary on the part of the designer of the product to allow to the supplier a certain freedom as regards [316] tolerances so that the product may be fit within its production schedule and production practice?

The Court: Unless there is some issue as to it.

(Testimony of Abraham Grossman.)

Mr. Duque: I would assume that to be correct, your Honor. I don't know if it is a matter of judicial notice or not.

The Court: Well, if it is a matter of common knowledge in the industry it is a matter of judicial notice, then the Court can have judicial knowledge. So I will leave it to you gentlemen to give me the judicial knowledge on the subject.

Mr. Mahoney: I have attempted to present by the testimony of Mr. Grossman the judicial knowledge that these tolerances are customarily applied to the parts after the original dimensions are submitted. Mr. Meyer testified that these tolerances had been applied by way of answer to whether anything had been added to the disclosures of the plaintiff here. And our purpose is to show that what was added was customary and not significant, and that the disclosures, as originally presented, were the heart of the matter.

Mr. Duque: Well, your Honor, whatever questions he wishes to ask Mr. Grossman, I am not going to interpose any objection. I will put Mr. Meyer on and we will get the thing straightened out as much as we can.

Q. (By Mr. Mahoney): Mr. Grossman, Mr. Meyer testified as to the redesign of the weatherstripping of the extrusion [317] which held the weatherstripping—

The Court: Before you leave this other subject, has this witness answered your question as to what was customary?

(Testimony of Abraham Grossman.)

Mr. Mahoney: Will you read back the question, please?

The Court: I suggest you rephrase it.

Q. (By Mr. Mahoney): Mr. Grossman, in your dealings with the suppliers of aluminum extrusions, when you submit a dimension drawing to the supplier, such as the drawing Plaintiff's Exhibit 6, is it not customary for the supplier to add to the figures of the drawing and the die prints returned to you for review, certain commercial tolerances which facilitate the manufacture of the part for your account?

A. It is when the commercial tolerance does not balance equally to the plus or minus side, there is no notation except possibly at the bottom of the sheet, but not on the drawing directly. But if there is a special commercial tolerance or the tolerance is still within the commercial limitations, but it is unequally divided between the plus and minus side, there is a special notation, with agreement to the customer, for that particular part to fit.

The Court: Were there any parts in this design you made for this door, which did not permit any tolerances in the function of it?

The Witness: No. [318]

Q. (By Mr. Mahoney): Mr. Grossman, Mr. Meyer has testified to the fact that there was a redesign of the extrusion which held the weatherstripping, and I believe that extrusion is shown in part No. 5X, and on drawing No. L-8439, which is incorporated in Plaintiff's Exhibit No. 8. Mr. Meyer

(Testimony of Abraham Grossman.)

also testified that it was upon his suggestion to you that the redesign of that extrusion took place. Is that true? A. No, it is not.

Q. Did you ever submit to Mr. Meyer with the first drawing of the extrusion any weatherstripping by which he could determine whether the weatherstripping would fit in the extrusion properly or not?

A. I did not.

Q. In your opinion could he have determined, without the weatherstripping, whether the extrusion would have functioned to retain the weatherstripping?

A. No. Our first drawing didn't indicate there would be weatherstripping in that particular receptacle. The thought was to have the part designed, the part produced from the die and weatherstripping constructed to fit the part afterwards.

Q. Can you explain how the change took place in part No. 5X?

A. Yes. The original 5X provided a receptacle for [319] weatherstripping that we were going to have made especially to fit that receptacle. And after talking with the weatherstripping people they assured us they could give us a better deal and a more economical deal by using one of their stock parts, which necessitated a different receptacle designed to receive that weatherstripping in that same part. So that the part that was redesigned was that particular portion that was used as a receptacle for that weatherstripping. And drawings of that part, in addition to the changed drawings that we went to

(Testimony of Abraham Grossman.)
receive that part, were sent to the Reynolds Metals Company for revision at that time.

Q. And did you submit this redesign to the Reynolds Metals Company solely upon your initiative? A. Yes.

Q. Now, Mr. Grossman, consulting the various cross-sectional part drawings in Plaintiff's Exhibit 6, and considering the dimensions thereof, to your knowledge is there any part shown there which, if manufactured to those dimensions without commercial tolerances but exactly as shown, would not fit one within the other as intended?

A. They would all fit if made as drawn.

Q. And, therefore, would you say in your opinion, and in accordance with your experience as to the practice of extruders, that the addition of commercial tolerances was solely to permit the manufacturer of extrusions to supply [320] extrusions which would fit together in—and allowing in die qualities and other manufacturing procedures?

Mr. Duque: I object to the question on the grounds that it is leading and suggestive, and unintelligible.

The Court: Sustained.

We will take the noon recess. You may reframe it.
We will recess until 2:00 o'clock.

(Whereupon, a recess was taken until 2:00 o'clock p.m. of the same day.) [321]

Wednesday, November 23, 1955—2:00 P.M.

The Court: Are there any ex parte matters?

The Clerk: No, your Honor.

The Court: You may proceed with the case on trial.

ABRAHAM GROSSMAN

a witness called by the plaintiff in rebuttal, having been previously sworn, resumed the stand and testified further as follows:

Direct Examination

(Continued)

By Mr. Mahoney:

Q. Mr. Grossman, after you had presented the first drawing showing the extrusions with a receptacle for the weatherstripping to the Reynolds Metals Company, what took place?

A. Well, I received a call from Mr. Meyer stating that he would like to come over to see us to talk about it. And he did.

Q. And why did he say he had come?

A. Well, on the telephone, I don't recall the reason. But when he came, he said that there were certain simplifications that he thought could be accomplished; if the receptacle were to remain in the same position relative to its purpose in weatherstripping the track, that would simplify the die construction. And after looking over the drawings, I said that if the relative position of that weatherstripping [322] were still to take place, I would suggest several different methods by which the re-

(Testimony of Abraham Grossman.)

ceptacle could be simplified, and I, in order to save time, because that die was the last of the dies in view of that initial change to be made, I in freehand drew a number of possibilities that he could choose from, still maintaining the over-all purpose of the relationship of the weatherstripping to the track. And it was one of these suggestions that was presented to me finally in a redrawn form by Reynolds that I okayed for the final production of that die.

Q. Mr. Grossman, you testified this conference with Mr. Meyer took place after the first drawing. Did you—

A. Well, this was after the second drawing. Excuse me. The first drawing was Exhibit 6. Then another drawing was sent to Reynolds, and it was after the second drawing was sent that this conference took place.

Q. And with the modifications which you made in the second drawing did they—was the product manufactured in accordance therewith?

A. No. The final drawing was made according to the freehand revisions that I made for Mr. Meyer when he came to see us.

Q. You made these freehand sketches while Mr. Meyer was there?

A. Yes, right in the drafting room of our company. [323]

Q. Did he make any suggestions as to the form which the extrusions should take?

A. He might have had some discussion with me

(Testimony of Abraham Grossman.)
on my suggestions, but I don't recall that he made any that contributed to my final decision for the form.

Mr. Mahoney: That will be all. Your witness,
Mr. Duque.

Cross-Examination

By Mr. Duque:

Q. Mr. Grossman, I understood your testimony before the luncheon recess to be that there was never any weatherstripping drawings submitted. Is that right?

A. Oh, I did not say that at all. I said the opposite, that there were weatherstripping drawings submitted.

Q. Submitted by whom to whom?

A. By me to Reynolds.

Q. Did you discuss this matter with your counsel after I had shown him all of the Reynolds' matters at the recess?

A. No, I did not. We went over this thoroughly even before the trial took place.

Mr. Duque: No further questions.

The Court: You may step down, Mr. Grossman.

(Witness excused.)

The Court: Any further rebuttal?

Mr. Mahoney: No rebuttal, your Honor. I would like at this time to put Mr. Pinson on the stand on the case in [324] chief.

The Court: You may.

LOUIS PINSON

called as a witness by the plaintiff, having been previously sworn, was recalled and testified further as follows:

Direct Examination

By Mr. Mahoney:

Q. I show you Plaintiff's Exhibit No. 27 for identification, and ask you what the title that the document bears is?

A. This is a financial statement.

The Court: Covering what period?

The Witness: Up to July 31st in the year 1955.

The Court: From January 1st through July 31st, is that correct?

The Witness: That is correct.

Q. (By Mr. Mahoney): By whom was this financial statement prepared?

A. That was prepared by David Belinkoff.

Q. And who is David Belinkoff?

A. They are our auditors and certified public accountants.

Mr. Mahoney: I now offer Plaintiff's Exhibit 27 for identification in evidence.

The Court: Is there any objection? [325]

Mr. Duque: No objection, your Honor.

The Court: It may be received in evidence.

(The exhibit referred to was marked Plaintiff's Exhibit 27 and received in evidence.)

Mr. Mahoney: Your witness, Mr. Duque.

(Testimony of Louis Pinson.)

Cross-Examination

By Mr. Duque:

Q. Is this last exhibit that you identified a certified audit or just an audit that is taken from the books of the Panaview company?

A. This audit is taken from the books. Our last certified audit was as of May 31st. So we have a two-month period since the last certified audit.

Q. The answer to my question then is that this is not a certified audit, is that right?

A. That is true.

Mr. Duque: Thank you. No further questions.

The Court: Any further questions of Mr. Pinson?

Mr. Mahoney: No further questions, your Honor.

The Court: You may step down.

(Witness excused.)

The Court: Does the plaintiff now rest?

Mr. Mahoney: Yes, your Honor.

The Court: Does the defendant rest?

Mr. Duque: Your Honor, I would like to call Mr. Meyer [326] in surrebuttal.

The Court: You may.

O. J. MEYER, JR.

called as a witness by the defendant in surrebuttal, having been previously sworn, was examined and testified as follows:

Mr. Duque: Will you please mark these for identification?

(The exhibits referred to were marked Defendant's Exhibits G, H, I, J and K for identification.)

Direct Examination

By Mr. Duque:

Q. I show you a drawing, Mr. Meyer, that has been marked Defendant's Exhibit G for identification. Will you tell us what that drawing is, please?

A. This is the print submitted by the customer Panaview for purposes of making the Reynolds section drawings.

Q. And is it identical to the one that you previously looked at here that was introduced by the plaintiff?

A. Yes. This is a print made from the plaintiff's tracing.

Q. Very well. I now hand you Defendant's Exhibit H for identification and ask you what that is?

A. This is a print which incorporates the change in the weatherstriping groove on Part 5X of the Panador.

Q. Who made that print? [327]

A. I do not know. The print was submitted by

(Testimony of O. J. Meyer, Jr.)

the customer Panaview. Who made the print, I don't know.

Q. But it was submitted to you after the original drawing? A. That's right.

Q. How long after? Do you remember?

A. We were still in the process of making the section drawings from customer's first print when a second change came through.

Q. I now show you Defendant's Exhibit I for identification. Will you tell us what that is, please, sir?

A. This is a print of the Schlagel weatherstrip which customer used in Part No. 5X as their weatherstripping section, and shows the detailing and dimensions and tolerances that the section is fabricated to.

Q. Now, will you tell us what transpired between the receipt by you of the second exhibit which you have just identified, and the last one?

A. The basic dimensions shown on the second print, which is H, showing the width of the weatherstripping groove as .437 and the depth as .070, with no tolerances shown, was incorporated in our original drawing, the die number not showing an A suffix. To the depth dimension .070 was added a special commercial tolerance, plus 12 minus nothing, to facilitate the weatherstripping section. [328]

Q. Now, I hand you Defendant's Exhibit J for identification, and ask you what that document is?

A. J is a print showing our A revision to Cus-

(Testimony of O. J. Meyer, Jr.)

customer 5X, which shows a further revision of the weatherstripping groove.

Q. And by whom was that made?

A. This change was made as a result of having received this print showing the Schlage weatherstripping, which shows a basic dimension of .437 and the width dimension of .070, plus or minus 5. And as we had originally made the drawings showing .070 inches, plus 12 minus nothing and the width dimension of .437, the weatherstripping was still not assembled with the section. It was at that point that I questioned the assembly of the weatherstripping with the extruded section, and with the result that section 5X was revised to our A revision, widening up the weatherstripping groove to facilitate the assembly of same.

The Court: The question was, who did it? Who prepared Exhibit J for identification?

The Witness: We prepared that in our office.

Q. (By Mr. Duque): I now hand you Defendant's Exhibit K for identification. Those are a series of drawings which are clipped together. Will you tell us what they are, please?

A. Exhibit K shows the final revisions performed on the sections for Panaview. All but Die 10418, customer [329] section 5X, were as the material shipped to Panaview. On customer 5X, a certain amount of material was shipped as against our die No. 10418-A. The revisions made in the weatherstripping group were still not sufficient to facilitate assembly due to the fact that the weatherstrip-

(Testimony of O. J. Meyer, Jr.)

ping is installed by hand and has a tendency to kink, and once this weatherstripping kinks it is almost impossible to remove same. The customer desired an easy assembly of the weatherstrip in the sections. The customer, in order to utilize the material on hand, to the best of my recollection, used a plastic base weatherstrip section which gave to the contour of the extrusion.

The customer utilized the sections on hand using the plastic weatherstrip. It was desired at that time to further revise the weatherstripping groove so as to facilitate a loose slip fit of the weatherstrip that should it drop through it would be possible to distort the shape of the weatherstrip so that it would be held in place within the extrusion. Because at that same time there was a question raised as to the binding effect of the two weatherstrip sections upon the top row, that when a door is moved in one direction the fibers of the weatherstrip had a tendency to trail, and when that direction was reversed, the fibers came together and would temporarily bind the section. So it was decided to correct both situations at the same time, [330] which would be to change the spacing of the weatherstrips relative to one another, and also to widen the weatherstripping groove to facilitate even a looser assembly. And those changes were incorporated in our die drawing 10418-B.

Q. When you say "it was decided," Mr. Meyer, what do you mean? Who was it decided by? You? Or Reynolds Metals engineering division?

(Testimony of O. J. Meyer, Jr.)

A. I made a call to the customer, discussing the situation with him, and explaining how the variation of our dimensional tolerances could affect this assembly, and it was out of that meeting that we recommended such dimensions be shown.

Q. Was the decision made by you to make those changes?

A. The suggestion was offered to the customer and his decision to go along with them.

Q. But you were the one who made the suggestions and conceived the changes that were made?

A. The final dimensions, yes.

Q. In connection with the special tolerances that were determined, who determined those special tolerances? Did you, at Reynolds Metals, or did Mr. Grossman?

A. In the discussion I supplied the tolerances from a tolerance chart and showed that they could be placed all on one side, without any additional pricing charge.

Q. And that was your idea? [331]

A. In this application, yes.

Q. And you submitted it to Mr. Grossman and after looking it over he agreed and approved it, is that correct?

A. The final dimensions and the tolerances, yes.

Mr. Duque: That is all.

Mr. Mahoney: No questions, your Honor.

Mr. Duque: May we offer in evidence the Exhibits G through K, your Honor, which have been identified by the witness?

(Testimony of O. J. Meyer, Jr.)

The Court: Is there an objection?

They may be received in evidence.

(The exhibits referred to, marked Defendant's Exhibits G, H, I, J, and K, were received in evidence.)

The Court: Mr. Meyer, whenever a customer submits you a drawing with fixed dimensions, do you always add to it some tolerances?

The Witness: No, sir. In some cases when sections are submitted to us showing just plain dimensions and there is no information relative to assembly fits, we operate on the basis that that is what the customer wants; and not knowing that there is an assembly, we process the prints on that basis, with the understanding that commercial tolerances are to apply, plus or minus so much.

The Court: Now, these tolerances you have been testifying about are over and above and in addition to the ordinary [332] commercial tolerances, are they?

The Witness: It is a rearrangement of the normal commercial tolerances, yes.

The Court: Are there certain normal commercial tolerances that are accepted in the trade?

The Witness: Yes, sir. The aluminum industry in the aluminum association have established certain tolerances which are considered standard.

The Court: And those are on a chart to which you have referred?

(Testimony of O. J. Meyer, Jr.)

The Witness: That's right.

The Court: Now, these tolerances that you supplied for the plaintiff's drawings, did they in every case exceed the tolerances, the normal commercial tolerances?

The Witness: They did not exceed in toto. They were the same in toto, if you would add plus or minus to—

The Court: Let's see if we mean the same thing. By "exceed," I mean exceed in the sense of being greater instead of being lesser.

The Witness: The total manufacturing allowance was actually the same, arranged in a different manner, to guarantee that the assemblies would fit together.

The Court: All applied to one side instead of two sides.

The Witness: That's right. [333]

The Court: In some cases.

The Witness: Operating in opposite directions on mating parts.

The Court: That is all I have. Anything further, gentlemen?

Mr. Duque: May I ask the witness one thing further, your Honor?

When you say you arranged them differently, what do you mean by that, Mr. Meyer? Or, what actually did you do?

The Witness: Well, the standard practice, understanding of the tolerances being on the plus or minus side and showing the same nominal dimen-

(Testimony of O. J. Meyer, Jr.)

sions on mating parts, if left in that manner with the understanding that the tolerances would vary plus or minus conceivably with the extrusions varying within those tolerances, they could bind and not possibly be assembled together. And that is the purpose in working from a starting point and moving in opposite directions, to guarantee that the assembly would be positive.

Mr. Duque: And in your opinion the rearrangement of those tolerances was the thing that made the door work, is that correct?

The Witness: They were necessary to guarantee the assembly of the respective parts.

Mr. Duque: That is all.

Mr. Mahoney: No questions, your Honor. [334]

The Court: You may step down, Mr. Meyer.

Mr. Duque: We have no further witnesses. We have no further evidence, your Honor.

The Court: Does the defendant rest?

Mr. Duque: Yes.

The Court: Both sides rest?

Mr. Mahoney: Yes, your Honor.

The Court: Do you wish to argue the matter?

Mr. Mahoney: Yes, your Honor.

The Court: Are you ready to proceed now?

Mr. Mahoney: Yes, your Honor.

The Court: You may proceed.

Mr. Mahoney: May it please the Court, the plaintiff here has urged three causes of action; one a cause of action for breach of an express contract; a second cause of action for a breach of confiden-

tial relationship; and a third for unfair competition.

The plaintiff's first cause of action rests upon the terms and conditions constituting a part of the acknowledgment which constitutes a part of the transaction entered into between the plaintiff and defendant when the dies from which customer part Nos. 1X to 9X were to be fabricated.

Referring to Plaintiff's Exhibit 21, we find the original of the acknowledgement which is to be found in the file of the defendant here. The acknowledgement consists of a [335] plurality of separate pages which have been stapled together and which bear in pencil handwriting the specific numbers of the individual dies which are identified and related with the specific parts which were to be manufactured from those dies to the order of the customer. Opposite each of the die numbers is a designation, in a column called "Price," of a substantial sum of money. For instance, opposite 2X is \$150; and in the handwritten order there appears the statement "die charge."

Now, it has been stipulated here that the plaintiff has performed its contract by virtue of complete payment of the purchase order. And plaintiff relies here on the terms and conditions which appear as a part of this original acknowledgment, particularly paragraph 11 thereof which reads "Equipment." This paragraph specifies,

"Any equipment (including jigs, printing plates or cylinders, dies and tools, etc.) which

Seller constructs or acquires specifically and solely for use on Buyer's order shall be and remain Seller's property and in Seller's sole possession and control. Any charges made by Seller therefor shall be for the use of such equipment only. When Seller has not accepted orders from Buyer for product to be made with such equipment for a period of one year, Seller may then require Buyer to give disposition [336] of the said equipment, and in the event such disposition is not given within thirty (30) days after such demand, Seller may without liability make such disposition as it sees fit or may store the equipment for the account of Buyer, charging Buyer for the storage charges."

Now, defendant here has filed a supplemental memorandum in which it states that in its opinion the pertinent portion of paragraph 11 of the terms and conditions of defendant's acknowledgment reads "as follows" and then there is quoted only the first sentence of the paragraph.

It is plaintiff's position here that the fundamental principles of contract law would dictate that the entire paragraph be read to ascertain whether the terms of paragraph 11 are applicable to the dies which are listed on the front of the acknowledgment and which were ordered on a basis of the terms and conditions appearing on the back of the acknowledgment.

Now, defendant evidently takes the position that

while paragraph 11 constitutes a part of the terms and conditions under which this transaction took place, and is applicable to the transaction, the word "any" and the words "specifically" and "solely" eliminate any consideration whatsoever of the fact that the dies were ordered specifically and solely for the use of the plaintiff and that a die charge was made [337] therefor.

Considering the position of the defendant in detail here, and looking at the facts of the actual transaction as it took place, it is apparent from the testimony of Mr. Grossman that he submitted the drawings Plaintiff's Exhibit 6-X to the defendant and that the acknowledgment was forthcoming in response thereto. If the dies which appear on the face of the acknowledgment were not manufactured solely for the use of the plaintiff, whom else were they manufactured for at the time that the transaction took place? There was no other party in the picture when this agreement and this acknowledgment was presented to the plaintiff here.

So far as "specifically" is concerned, it is obvious that the dies were intended specifically for the use of the plaintiff on its order for its parts 1-9-X; and at that time there was no other party in the transaction for whom the dies were to be manufactured or used.

The Court: I don't suppose there is any question about that, that the dies were made specifically for the plaintiff. The question is where is the provision that they were made solely for the plaintiff.

Mr. Mahoney: Well, your Honor, if they were

made specifically for the plaintiff in accordance with the language of the acknowledgment, certainly the language "solely" would also apply. [338]

If you are going to apply one word of paragraph 11 of the acknowledgment, certainly you cannot excerpt another word therefrom.

The Court: You mean "solely" and "specifically" are synonymous terms?

Mr. Mahoney: I mean that "solely" and "specifically" mean substantially the same thing.

The Court: Have you compared paragraph 12 of Exhibit 5, which was an older, older form of the Reynolds Metals Company apparently, which was sent to the Glide Company with this apparent later edition, paragraph 11 of Exhibit 2?

Mr. Mahoney: Yes, your Honor, we have read the terms of that.

The Court: You will notice there is a very significant sentence that is omitted there. I was just wondering what your explanation of that is.

Mr. Mahoney: Well, your Honor, in the first place it is the position of the plaintiff that the terms and acknowledgments constituting a part of the transaction in issue here stands on its own. But if consideration is to be given to the change in paragraph 12 in plaintiff's Exhibit 5, it can be shown that—

The Court: Isn't it one of the relevant surrounding circumstances?

Mr. Mahoney: Well, your Honor, the only relevance it [339] has here is that this was a change made in a clause of an acknowledgment which was

made without any explanation whatsoever to the plaintiff here.

The Court: I know, but the plaintiff has testified that they had a certain understanding that these dies were to be kept solely for their use, for plaintiff's use. Now, the inclusion of that sentence —perhaps you can give us that sentence so we can have it in the record.

Mr. Mahoney: Yes, your Honor. I will read it.

"Any equipment (including jigs, printing plates or cylinders, dies and tools, but excluding patterns) which Seller constructs or acquires specifically for use on Buyer's order shall be and remain Seller's property and in Seller's sole possession and control, and any charges made by Seller therefor shall be for the use of such equipment only. All such equipment will be excused exclusively for the manufacture of products for Buyer * * *"

The Court: That is the sentence, that last sentence you read about the use of the equipment. The inclusion of that sentence in paragraph 12 of Exhibit 5 to the Glide Company might be an explanation, might it not, of the plaintiff's understanding here that the dies in question here were to be kept by Reynolds solely for plaintiff's use? [340]

Mr. Mahoney: It could be an explanation, your Honor, but it is contended that the language here is merely a revision of the language of paragraph 12 of the terms and conditions shown in Exhibit 5.

The Court: Do you find that sentence you have just read in paragraph 11 anywhere?

Mr. Mahoney: No, your Honor, I do not find it here. But the point we would make is that the word "solely" has been interposed.

The Court: After "specifically."

Mr. Mahoney: After "specifically." And the facts of the matter are these: Why, taking the logic of the situation, would the plaintiff pay a die charge amounting to \$1430, said dies to be manufactured in conformity with the drawings submitted by the plaintiff if it was not going to obtain some sort of property right?

The Court: Well, that might be arguable as a business proposition; but as a legal proposition——

Mr. Mahoney: Well, as a legal proposition, your Honor, why is this provision on the back of the acknowledgment agreement if it doesn't have specific application to a situation where die charges are made?

The Court: Well, I wouldn't promote the lawyer who drafted that. I will say that much for him. But the first two sentences say that the die shall be the property of the [341] defendant. The last part of it says they will be stored for the account of the buyer under certain conditions. The defendant doesn't usually store his property for the account of the plaintiff, does he?

Mr. Mahoney: That's correct, your Honor.

The Court: Let's look at it this way: Is there any question but that the dies are the property, under the agreement, of the defendant?

Mr. Mahoney: There is no question, your Honor.

The Court: Then may not a person do anything he pleases with his property in the absence of a covenant not to do so?

Mr. Mahoney: Yes.

The Court: That is, anything otherwise lawful.

Mr. Mahoney: That is correct, your Honor.

The Court: Now, where is there a covenant here with this plaintiff?

Mr. Mahoney: The covenant consists of the statement that "Any equipment * * * which seller constructs or acquires specifically and solely for use on buyer's order shall be and remain seller's property and in seller's sole possession and control. Any charges made by seller therefor shall be for the use of such equipment only * * *"

Now, the charges made therefor were for the use of the dies.

Now, if "any charges" refers to the specific "any equipment," [342] then "any equipment" is equipment which is made specifically and solely for the use of the customer.

The Court: That is not necessarily so, is it? I assume that there might be dies made not specifically and solely for the use of the customer. Any that are covered by that provision, aren't they?

Mr. Mahoney: Yes, your Honor. But if the defendant persists in misinterpretation of the agreement, and particularly this paragraph, they are on the horns of a dilemma because if these dies were not constructed specifically and solely for the account of the plaintiff and the exclusive use reserved

for the account of the plaintiff in accordance with the terms of paragraph 11, then there is no agreement in writing whatsoever relating to these dies. Plaintiff has made a die charge price therefor and plaintiff owns the dies because the defendant has not reserved any right, property right in the dies whatsoever.

The Court: Your position is, as I understand it, that if paragraph 11 applies it applies only to dies which are made specifically and solely for a customer.

Mr. Mahoney: That is correct, your Honor.

The Court: And if the defendant relies on paragraph 11, it must do so upon the premise that it made these dies solely and specifically, specifically and solely for the use of the plaintiff. [343]

Mr. Mahoney: That is correct, your Honor.

The Court: And the provision of paragraph 11, in other words, which gives the defendant the property right in the dies also gives it under the circumstances stated, namely, that the dies shall have been made specifically and solely for the use of the customer—

Mr. Mahoney: That is absolutely right, your Honor.

The Court: —that unless the dies here were made specifically and solely for the use of the plaintiff they are not covered by those provisions of paragraph 11—

Mr. Mahoney: That is correct, your Honor.

The Court: —that if they are not covered by the provisions of paragraph 11, the plaintiff, having

paid the die charge therefor, is the owner of the property and entitled to direct the use of it.

Mr. Mahoney: That is correct, your Honor.

The Court: I have your point.

Now, that is on the breach of contract.

Mr. Mahoney: Well, your Honor, there is one other point which I would like to refer to in relation to the contract, and that is the affidavit of Mr. Yates. Mr. Yates has testified that he is the regional general sales manager, Pacific Coast region, and that during the years he has worked with Reynolds Metals Company in its various departments and divisions—— [344]

The Court: Well, what does this have to do with it?

Mr. Mahoney: I am going to read you his statement in regard to the contract which appears in the affidavit at page 3, lines 20—between 26 and 27, and carrying over onto page 4.

He says:

“By written agreement with Panaview, as is usual and customary in our dealings with customers for whom extruded shapes are made, the dies which we made were to remain the property of Reynolds Metals Company and under Reynolds Metals Company’s sole possession and control, and Panaview simply acquired a priority on the use of the dies whenever its orders for extruded shapes were received by us. At no time did we agree by written contract, orally or otherwise, that the dies

which were made to produce extruded shapes for Panaview would be used exclusively or solely to produce extrusions for Panaview, as is erroneously alleged in Paragraph III of Plaintiff's Complaint, which I have read."

Now, your Honor, if Panaview acquired any rights of use, exclusive use, rights of use under this paragraph 11, it acquired exclusive use. The testimony of Mr. Yates in regard to the priority on the use of the dies is indicative of the fact that the defendant has conceded that under paragraph [345] 11 there is a right in the plaintiff to use of the dies, and to preferred use of the dies.

The Court: What do you say to the fact which appears here that the defendant had more than one set of these dies?

Mr. Mahoney: Your Honor, the sets of dies all bore the same die number as was previously allotted to the dies which were manufactured by the defendant for the account of Panaview. Now, if these dies were used indiscriminately, as Mr. Hairston testified, there would be absolutely no way in which the defendant could distinguish between the dies, and they constituted essentially fungible goods whose intermingling by the wrongful acts of the defendant must be ascribed solely to the defendant's door. It is up to the defendant to explain that one set of dies was or was not used on the products of a customer of Reynolds Metals Company.

The Court: Well, is there anything to prevent the defendant from making a dozen sets of them?

Mr. Mahoney: There certainly is, your Honor.
The Court: What is that?

Mr. Mahoney: The drawings were submitted, Plaintiff's Exhibit 6, in confidence to the defendant. And to make these drawings, or to make the dies, the defendant would have to rely on the fund of information contained in Plaintiff's Exhibit 6 in the fund of information which was derived from Plaintiff's Exhibit 6, which is Plaintiff's Exhibit 8. [346] Therefore, it would be a continual resort to the same source of information, which is Plaintiff's information, to manufacture these dies.

The Court: Is it your contention that if a person submits information to someone else in confidence that that person cannot use that information?

Mr. Mahoney: To the detriment and harm of the person who submits it to him in confidence.

The Court: Where is there any authority for that? It's a sound moral proposition.

Mr. Mahoney: I have several cases here which go to uphold that. In the Smith against Dravo case, the defendant negotiated with the plaintiff for the purchase of its business. The plaintiff submitted drawings to the defendant, submitted actual samples to the defendant, and actually submitted, also, little brochures which showed some of the detail of the construction, which happened to be a particular type of shipping bin. When the negotiations terminated there were at that time available to the defendant actual commercial models which were being used, but instead of going to the actual commercial

models which were in use, the defendant turned to that which had been given to it by the plaintiff and utilizing that fund of information which consisted in drawings and in exemplary embodiment of the devices went into competition with the plaintiff. And this action [347] was enjoined by the court as a breach of confidential relationship.

The Court: I have never heard of an action for a breach of confidential relationship, as such. I have heard of people standing in a fiduciary relationship to each other and in that relationship imposing certain duties—the law imposes certain duties.

Mr. Mahoney: Yes, your Honor. Well, we are saying here that there was a breach of trust and confidence.

The Court: There might have been. But there must be some property right violated, must there not?

Mr. Mahoney: There was a property right violated, your Honor; the intellectual property which was incorporated in the drawings of Plaintiff's Exhibit 6 were submitted to the defendant and from those drawings defendant, by a series of stages, manufactured the dies which were ultimately used to manufacture extrusions for the account of the defendant and transmit it to its parts department. The defendant by the use of the dies on its own behalf violated its position of trust with the plaintiff, and used the end product of that which was disclosed in confidence, namely, the dies, to the harm and detriment of the plaintiff.

The Court: Was there anything to prevent anyone from taking one of these doors and reversing the process, working back to the die? [348]

Mr. Mahoney: Your Honor, this is exactly on all fours with the situation in Smith against Dravo. The fact of the matter is that there is no testimony here whatsoever that the duplicates of the dies were made from any other drawings than from the drawings which came from the plaintiff. There has been no submission in evidence that there were separate drawings from which these duplicate dies were manufactured. So the defendant did not do it. And speculation as to whether it could have done it—

The Court: There is nothing to prevent it, so there is no property right in the end product. You say the property right is a literary property right arising from the drawings, being the creation of the plaintiff, the intellectual creation of the plaintiff. Is that it?

Mr. Mahoney: Here is one of the points in Smith against Dravo, your Honor: The fact that the defendant could have gained possession of his competitor's product through lawful means and then by inspection and analysis created a duplicate does not mean that he may, through a breach of confidence, gain the information in usable form and escape the efforts of inspection and analysis.

The Court: Well, your answer to my question then, I take it, is yes. Is that it?

Mr. Mahoney: Well, your Honor, will you please repeat your question? [349]

The Court: My question is that you don't rely on any property right in the product of the die?

Mr. Mahoney: Oh, no. The extrusions themselves.

The Court: You don't claim any right to prevent anyone from producing those extrusions?

Mr. Mahoney: The only one we claim a right against is Reynolds Metals Company at the present juncture.

The Court: Well, if Reynolds Metals Company went anywhere and bought a box of these parts and worked backwards to the drawing and made the dies from those, why, you wouldn't have anything to say, would you, under your theory?

Mr. Mahoney: Well, your Honor, as an extension of their contract, this is all linked together. There is an implied covenant of good faith, and I would think—

The Court: The implied covenant of good faith is not an implied covenant not to compete, is it?

Mr. Mahoney: But, your Honor, there is more than competition here. The plaintiff is a customer who has utilized the defendant as a supplier, and they do not stand on equal ground as would two individual competitors.

The Court: But the test is the contract, isn't it? It may be an abuse. A striking example of it is in the automobile industry. A man may have a dealership, and he invests hundreds of thousands of dollars in it, and the factory can cancel him out in 30 days under some such provision [350] under the

contract. They don't stand on equal footing, do they?

Mr. Mahoney: No, your Honor.

The Court: This man has spent thousands building himself up in the community as an ex-automobile dealer, and not only the electric signs but all the equipment in his shop is predicated on the assumption that he should continue as an ex-automobile dealer. But the factory can cancel him out, and has done so. It is a very hard and a very unequal dealing, but nonetheless legal.

Mr. Mahoney: I agree with your Honor on that state of the facts, but I don't think that it is on all fours with the conditions here.

The Court: Add something to it that makes this case different.

Mr. Mahoney: Well, your Honor, we have a contract which we contend says that the dies were made specifically, and your Honor has already stated that he does believe that the dies were made specifically for the plaintiff.

The Court: Well, I don't suppose there is any question about it that the plaintiff submitted the drawings and the drawings were made at the plaintiff's order.

Mr. Mahoney: So we come to the question of "solely." And the point we make here is that "solely and specifically" follow logically from the fact that a charge is made; that [351] the plaintiff would not pay a substantial die charge for dies which could then be used freely by the defendant for the account of any party for whom it chose to make the

dies, utilize the dies, including itself.

Now, your Honor, when we say that the dies were made solely and exclusively to manufacture other dies would constitute a mere subterfuge and evasion of the contract.

The Court: Well, what does that mean?

Mr. Mahoney: What that means is, your Honor, the contract would have no significance if the defendant here, to avoid its obligation under the contract, could merely utilize the parent dies and the parent drawings and make other dies to produce extrusions for its own account, or for the account of others than the plaintiff.

The Court: But suppose the defendant says, "We won't do that. We won't look at the drawings. We won't copy the dies."

Mr. Mahoney: But they didn't do it.

The Court: "These materials are out in the public domain. There is no patent on them, design or otherwise. There is no copyright. So we will just go at it backwards and go get the parts. We will go buy them."

Mr. Mahoney: But, your Honor, there is no evidence they did that.

The Court: I said suppose they had done it. Would [352] there be any action that this plaintiff could take?

Mr. Mahoney: Well, your Honor, if they went out and took the actual product and took the dimensions from the parts and then made die drawings it is our contention that it would still be a subterfuge. In other words, they would be going around

the contract in order to get in the back door; and doing in one way what they were estopped from doing in another way.

The Court: Well, let's assume now for the moment that the plaintiff has the sole and exclusive use of those particular dies.

Mr. Mahoney: Yes, your Honor.

The Court: Does the plaintiff have anything more than that? Does he have the right to prevent anyone from producing something exactly like it, so long as they don't use his drawings?

Mr. Mahoney: Well, your Honor, when you say "anyone," are you referring—

The Court: Anyone. I meant just that. Anyone.

Mr. Mahoney: I think we have the right to restrict the defendant here from doing that.

The Court: What is the basis of that right?

Mr. Mahoney: The basis of the right is that defendant has contracted that the dies upon which the die charges were made were for the exclusive use of the plaintiff. [353]

The Court: Yes. But the defendant says, "I haven't touched them. I can prove by 40 witnesses that these dies have never been used to produce anything but extrusions shipped to the plaintiff. Now, we have some other dies, however, just like them that we made ourselves."

Mr. Mahoney: Well, your Honor, to make those dies it would be inherent that they would have to resort to some form of drawing.

The Court: I don't know what they would have to do, but they have those same 40 witnesses to

prove that in making this second set of dies that they didn't even look at the drawings or the other dies. Now, what could you do about it?

Mr. Mahoney: Well, I would say in that case they probably would be outside of the breach of trust and confidence.

The Court: Breach of trust and confidence. There is no such action, is there?

Mr. Mahoney: No, your Honor.

The Court: That just makes the proof easier, doesn't it?

Mr. Mahoney: That's right.

The Court: If a breach of a fiduciary relationship exists—

Mr. Mahoney: Breach of a fiduciary relationship. [354]

The Court: —the burden of fair dealing—

Mr. Mahoney: That's right.

The Court: —shifts to the fiduciary.

Mr. Mahoney: That is correct, your Honor.

The Court: The burden of proof of fair dealing. But here, what you have, at the most, isn't it, is a literary property right; an intellectual property right, we will say? We won't call these drawings literary productions, but intellectual productions.

Mr. Mahoney: Yes.

The Court: You have a common law intellectual property right in the drawing—

Mr. Mahoney: Plus the contract.

The Court: —which prevents you from using it, plus a contractual right to prevent anyone from using those particular dies—

Mr. Mahoney: That is correct, your Honor.

The Court: —a particular set of dies which say the plaintiff bought and paid for.

Mr. Mahoney: Yes, your Honor.

The Court: So those are the two things you have. And if there is a breach of contract there's a breach of the contract in the use of those dies otherwise than as the defendant promised to use them. Is that not so?

Mr. Mahoney: Yes, your Honor. [355]

The Court: Now, is there any cause of action stated here for violation of any intellectual property right?

Mr. Mahoney: The first cause of action is the breach of contract. The second cause of action alleges the facts—it is entitled "breach of confidential relationship" and alleges the submission to the defendant of the blueprints.

The Court: Yes. But there is no violation of any confidential relationship, is there? What you claim here is a misappropriation by the defendant of the intellectual property rights of the plaintiff, isn't it?

Mr. Mahoney: That is correct, your Honor; they have breached its position of trust, its fiduciary relationship not to utilize that material which had been submitted to it for its own benefit to the detriment of the plaintiff.

The Court: Well, there was no such duty, was there? There was no duty not to use that information. There was a duty not to use it at all except for the plaintiff's consent. Isn't that your contention?

Mr. Mahoney: That is correct.

The Court: As far as the drawings are concerned?

Mr. Mahoney: That is correct.

The Court: Now, on this third cause of action where is there any unfair competition?

Mr. Mahoney: Well, your Honor, this being a diversity of citizenship case, and relying on Section 3369 of the [356] Civil Code of the Statement of California, wherein it is stated that:

“As used in this Section, ‘unfair competition’ shall mean and include unfair or fraudulent business practice.”

Now, in this case, your Honor, even the testimony of Mr. Gunderson, the defendant’s witness, goes to prove that the defendant was negotiating with plaintiff’s customers to supply the Windsor Manufacturing Company or the Windsor Supply Company with, as Mr. Sargeant stated in his affidavit, substantially all of the aluminum component parts of the aluminum frame sliding door.

The Court: But was there any obligation not to do that?

Mr. Mahoney: Well, your Honor, I think that this certainly constitutes a breach of the fiduciary relationship which the defendant had with the plaintiff arising out of its extension of the covenant of good faith implied in its contract with one hand—

The Court: Good faith to do what?

Mr. Mahoney: Not to utilize its position as a

supplier for the defendant—for the plaintiff, rather, to the detriment of the plaintiff.

The Court: Well, was there anything to prevent the defendant from coming down some Sunday morning and saying, "We won't supply you any more. Take your dies and go somewhere [357] else."

Mr. Mahoney: We would have been very happy if they had been that fair and square with us.

The Court: Yes. But it would have been a breach of good faith, wouldn't it, by the happening of something you certainly didn't expect to happen, and it put you to great disadvantage and caused you perhaps untold damage.

But is there anything to prevent, in law, is there anything to prevent the defendant from doing just that?

Mr. Mahoney: You mean returning the dies to us and cancelling us out?

The Court: Yes. On a moment's notice.

Mr. Mahoney: There wasn't, your Honor.

The Court: All right. You were in good faith relying on the defendant as a source of supply. There might not be another plant on the Pacific Coast or in the West that could duplicate what they were doing for you. It might have left you with unfilled orders. It might have caused you untold damage. But you wouldn't have a penny of recovery, would you?

Mr. Mahoney: Well, there was a purchase order which had already been acknowledged in this instance by the defendant, and a contract to supply

had been entered into between the plaintiff and defendant.

The Court: But you aren't suing here for the breach of [358] any contract to fill the purchase order.

Mr. Mahoney: Now, we are not, your Honor, but we are discussing the tragic state of affairs which you had propounded.

The Court: Well, I was propounding a hypothetical case. This talk about breach of bad faith and fiduciary relationships, it seems to me, doesn't add anything to the case. It just clouds the issue.

Mr. Mahoney: All right. Let's go a little further, your Honor. During the period in which they were supplying Windsor, and on cross-examination Mr. Hairston testified that so far as he knew a supply of one extrusion could be made to Windsor while the same extrusion would be lacking in the order which was delivered to Panaview.

The Court: Yes, if you were suing for a breach of a contract to deliver extrusions and you could prove that.

Mr. Mahoney: Well, your Honor, we have proved that the plaintiff, by the testimony of Mr. Pinson, was not receiving complete orders.

The Court: Yes. If you could prove that you could prove a wilful breach of the contract to supply extrusions. But you aren't suing on breach of contract.

Mr. Mahoney: That's right, your Honor. But what we intend to prove by that evidence is that by dealing as a competitor in supplying these sets

of extrusions to Windsor, [359] Reynolds was, to put it colloquially, cutting off the plaintiff's water at the source and to benefit itself with the profit which it could make in the operation of its parts department, was cutting out the plaintiff.

Now, certainly this constitutes a fraudulent position on the defendant's part.

The Court: Well, it's a very interesting point you make, but doesn't the public policy favoring free competition prevent the application of any such rule in the absence of a contract? We have all the time the situation where the customer teaches the supplier all the know-how of the trade, so to speak, and the supplier goes into business for himself. He likes the idea. He goes in competition with the customer. Is there anything to prevent it? Is that unfair competition? Morally, perhaps. Ethically, perhaps.

Mr. Mahoney: Not in a case where there are no other rights involved.

The Court: But here you don't assert any palming off of plaintiff's door—of defendant's product as the plaintiff's.

Mr. Mahoney: No, we do not, your Honor.

The Court: You don't claim any confusion in the public mind as to the source of this product?

Mr. Mahoney: No, your Honor.

The Court: Now, is there any California case—and [360] we are applying California law here—can you point to any California decision saying that it's unfair trade practice for a supplier to quit

supplying the person who gave him the idea and start supplying one of the competitors?

Mr. Mahoney: But that isn't what the defendant did here, your Honor. It didn't quit supplying us. It deceived the plaintiff with the idea that it was getting as much as the defendant could supply, whereas, as a matter of fact, the defendant was simultaneously supplying its own parts department so it could compete with the plaintiff; and was actually taking advantage of its position to place it in an unfair competitive position, not a reasonable, equal basis of competition, but by its position as source of supply was working behind the scenes, as it were, and supplying its own parts department while it was turning off the plaintiff's supply.

The Court: But is there any showing that the plaintiff lost a single sale on account of it?

Mr. Mahoney: Well, your Honor, it is shown that the plaintiff lost the sale of 5,000 doors to Windsor Supply Company.

The Court: But that is because the defendant was supplying the Windsor company at all, which you, as I understood, agreed that the defendant might legitimately do.

But is there any showing that any delay in supplying the plaintiff of these unbalanced orders you speak of, any [361] showing of any damage?

Mr. Mahoney: Yes, your Honor, in the letters that Mr. Pinson wrote he relayed to the defendant how this was holding up the sale and installation of the various—of the Panadors to various major

customers of the plaintiff. There certainly was a showing as to the manner in which—

The Court: But that would be a breach of the contract to supply, would it not?

Mr. Mahoney: But, your Honor, in the peculiar facts here takes on a different aspect.

The Court: Well, if you could prove that the defendant deliberately delayed deliveries and gave you without excuse, without legal excuse, gave you these unbalanced deliveries, you could certainly prove a breach of contract to deliver it, could you not?

Mr. Mahoney: Yes, your Honor.

The Court: And the damages would be the damages approximately resulting from such breach, would they not?

Mr. Mahoney: That's right, your Honor.

The Court: And you could show it was within the contemplation of the parties here that you couldn't assemble a door unless you had all the parts of the door.

Mr. Mahoney: That is correct.

The Court: But that isn't your case here.

Mr. Mahoney: No. We cite this as evidence of the manner [362] in which the manipulations of the defendant here aggravated the wrong that was done to the plaintiff by its initial acts of breach of contract and breach of its fiduciary relationship.

The Court: Well, yes, if you claimed a public confusion as to source. But I assume you can't do that because—

Mr. Mahoney: You couldn't do that because

Windsor would obviously know where their doors were coming from.

The Court: Well, you can't do it because the plaintiff was actually selling Windsor the same doors under Windsor's label, weren't they, and permitting Windsor to market under that label.

Mr. Mahoney: That is correct.

The Court: So any confusion as to source the plaintiff contributed to, didn't he?

Mr. Mahoney: Well, we are not contending that there was any.

The Court: There is no evidence of any.

Mr. Mahoney: Absolutely not.

The Court: Now, I am laying aside now the die question and the contract question and—

Mr. Mahoney: Yes.

The Court: —the drawing question. Just because a supplier mistreats a customer—if that were unfair competition and damages could be recovered for it, we would certainly [363] be busy with them.

Mr. Mahoney: Well, this is not a classic case of secondary meaning and palming off. The plaintiff here would be the first to admit that, your Honor.

However, utilizing the language of the statute, while there have been decisions of the court restricted to the classic definition of unfair competition as involving secondary meaning and passing off, the statute itself merely says:

*** * * including unfair and fraudulent business practices * * *,,

and it is the contention of the plaintiff here that certainly by any standards the acts of the defend-

ant in impairing plaintiff's business operations by permitting itself to get into a position in which it was going to send out short orders to the plaintiff in order to benefit itself constitutes an unfair business practice. And we contend that it constituted a fraudulent business practice. Because they never told the plaintiff, or ever disclosed to the plaintiff that it was in competition with Reynolds Metals Company. They never made a fair disclosure of this. They let the plaintiff go on blind fighting this problem of shortages while the defendant in the meanwhile was placing itself in a position not to compete with the plaintiff but to out-compete the plaintiff by its position as source of control—as source of supply, rather. [364]

I admit, your Honor, that this is not the classic case. But by the language of the statute we contend that certainly this was unfair and fraudulent conduct, and an unfair and fraudulent business practice.

The facts here are somewhat unique. The whole relationship of the parties—as a matter of fact, while we have thoroughly researched the law we have been unable to find a case which is on all fours in every particular with this case.

The Court: That "unfair" means unfair to the public, doesn't it; by confusing the public as to the source; by leading the public to think it is buying A's goods when it is buying, in truth, B's goods.

Take the automobile agency case I cited. Suppose the factory was after this dealer constantly to increase his sales, or cut his profit, move these

cars, and so forth; at the same time they were negotiating down the street for a new dealer. It is very unfair. Nothing is said. But is that actionable unfair competition in a court of law? It's unfair to the dealer. It might be to the point where you would call it monstrous behavior. But is it illegal?

Mr. Mahoney: No, your Honor. But extending the analogy a little further, if the dealer blindly thought that he was the sole—that he was being supplied solely in an area by the automobile manufacturer, and the automobile manufacturer, in turn, and behind his back, was cutting off [365] his supply so that they could establish a dealership around the block of which he was not cognizant, I would then say that this would be actionable because they would be violating the spirit of the franchise which they had previously extended to him.

The Court: Well, what supply of the plaintiff here was cut off? What orders were unfilled?

Mr. Mahoney: We have pointed out that over a period extending from March through June orders—

The Court: Deliveries were slow, weren't they?

Mr. Mahoney: Incomplete. Not slow, your Honor. If we had gotten—

The Court: But were any of them left unfilled?

Mr. Mahoney: But, your Honor, time is of the essence in this industry. If you don't get a door into a house when it is erected, somebody else is going to come along and put the door in because the people aren't going to go and live in the house with a gaping hole in it.

The Court: Well, you are asking the court here, as I understand it, to infer from this evidence that this defendant deliberately shorted the delivery, so to speak, so as to hamper the plaintiff and give Windsor the advantage. Is that it?

Mr. Mahoney: To give the defendant advantage so it would be able to sell complete orders to Windsor Manufacturing [366] Company. Certainly, if it took extrusions which could have completed an order to the plaintiff and put them in the Windsor order, then this would have certainly harmed the plaintiff and benefited the defendant.

The Court: There is no question about it. If you were suing here for a breach of contract of delivery there would be no question about it. But we are speaking of actionable unfair competition.

Anything further?

Mr. Mahoney: That will be all, your Honor.

The Court: We will take the afternoon recess at this time of five minutes.

(Short recess.)

Mr. Duque: I covered most of the points that I would cover in this argument at this time. The point with regard to the contract, as I pointed out to your Honor yesterday, the distinction between Plaintiff's Exhibit 2 and Plaintiff's Exhibit 5, is quite clear and your Honor has indicated, at that time yesterday, that he had that point well in mind and has also indicated it today in the questioning of plaintiff's counsel. I will not belabor the subject unless there are any questions of points of law that

your Honor wishes me to argue on that phase of it.

The Court: Whoever revised that what was paragraph 12 in Exhibit 5 into paragraph 11 of Exhibit 2, when that [367] sentence was eliminated —may I have those exhibits, Mr. Clerk?

(Whereupon, the documents were handed to the court.)

The Court: Paragraph 12 of Exhibit 5 states:

“Any equipment (including jigs, printing plates or cylinders, dies and tools, but excluding patterns) which Seller constructs or acquires specifically * * *”

That's the only adverb used there, “specifically”—

“* * * for use on Buyer's order shall be and remain Seller's property and in Seller's sole possession and control, and any charges made by Seller therefor shall be for the use of such equipment only.”

Then follows the sentence in the old form which was eliminated in the new one involved here, which reads:

“All such equipment will be used exclusively for the manufacture of products for Buyer.”

Now this is very clear.

Mr. Duque: Yes, your Honor.

The Court: Now, the reviser eliminated that sentence I last read and he says in paragraph 11 of Exhibit 2:

"Any equipment * * * which Seller constructs or acquires specifically * * *"

and then he added: [368]

"solely,"

and then goes on:

"* * * for use on Buyer's order shall be and remain Seller's property * * *"

and so forth.

"Any charges made by Seller therefor shall be for the use of such equipment only."

Now, plaintiff here makes the argument, as I understand it, that for this paragraph 11 to be applicable here the dies here must have been made specifically and solely for use on buyer's order. Those are the only kinds of dies that are mentioned in paragraph 11.

"Any equipment * * * which Seller constructs or acquires specifically and solely for use on Buyer's order shall be and remain Seller's property * * *"

Mr. Duque: Your Honor, there is no question, and we do not evade the subject or argue it in any way, that the first set of dies originally made were made specifically to produce extrusions for Panaview. But there is a difference in the word "specifically" and in the word "solely."

The Court: Yes.

Mr. Duque: And there is no evidence in this

record, may it please your Honor, that we ever contracted to use these dies solely to produce extrusions for the plaintiff in [369] this case.

The Court: So the defendant says that these dies here are not dies which the seller instructed specifically and solely for use on buyer's order.

Mr. Duque: Yes, your Honor.

The Court: So the defendant says here, does he not, that these are not the kind of dies that are covered by paragraph 11, Exhibit 2, because they are not dies which are specifically and solely for the use in buyer's order.

Now, if that be defendant's contention, the plaintiff says, as I understand the argument, "Well, if paragraph 11 doesn't apply, then we bought the dies. They are ours and we may control the use of them.

Mr. Duque: Yes. But the evidence, your Honor, doesn't support that. The evidence shows that the plaintiff paid a service die use charge of \$1,430 and that the cost of the dies was \$3,176.

The Court: Where does that appear?

Mr. Duque: Where does what appear, your Honor?

The Court: Where do those facts appear? You see, I haven't had a chance to examine all of this documentary evidence.

Mr. Duque: I am sorry, your Honor.

The die cost is contained in the stipulation of facts.

The Court: Yes. [370]

Mr. Duque: And the figure of \$3,176 is the cost

of the dies as testified to by Mr. Hairston, who is the comptroller who testified this morning.

The Court: Well, those original orders that came in—

Mr. Duque: The original orders, Mr. Hairston testified from those, your Honor.

The Court: What are the exhibit numbers? Exhibits 11 and 12?

Mr. Mahoney: Plaintiff's Exhibit 21, your Honor.

Mr. Duque: The entire Reynolds Metals file, Exhibit No. 21, yes, your Honor.

The Court. Yes. I haven't had an opportunity to examine that file.

Mr. Duque: If the court please, with regard to the interpretation of paragraph 11, paragraph 11 covers two situations, one where the dies are made solely for the use of the customer and another where it isn't solely for the use of the customer.

There are many cases where the customer pays the actual die charge, your Honor, and those dies are used solely for his use, such as in Government orders and—

The Court: Where is there any mention in paragraph 11 of Exhibit 2 of any other dies than those which are made solely and exclusively on the use of buyer's order?

Mr. Duque: It doesn't, your Honor. It simply says— [371]

The Court: There isn't any mention of that, is there?

Mr. Duque: No, your Honor.

The Court: What governs the title and use and disposition of dies which are not made solely for the—

Mr. Duque: If they are made in a parts department—there are two different departments of this company, the parts department, which does milling work, and the general sales which does the rough extrusion work.

The Court: Where is there any written evidence comparable to paragraph 11 as to what shall happen to the dies that are not made solely for the exclusive use of the buyer?

Mr. Duque: The comparable one appears in the exhibit which is an order, a customer's order. That's a parts department order, your Honor.

The Court: That is paragraph 11 over again, isn't it?

Mr. Duque: No.

The Court: May I see that?

Mr. Duque: I don't believe so.

The Court: Now, the charge made was only \$1,430. What do you say was the cost?

Mr. Duque: The cost was \$3,170, your Honor.

If the dies were not made solely for the use of the customer they would certainly remain the extruder's property, he having paid for them.

The Court: Well, the customer paid for them, didn't he? [372] He paid the die charge. Where are the invoices on that? May I see that Exhibit 21, Mr. Clerk?

(Whereupon, the document was handed to the court.)

Mr. Duque: He paid a die service charge, may it please your Honor, for the use of the dies, and we made extrusions for him and used those dies to make the extrusions. That's what he paid for and that is what he got.

The Court: Was that total of \$1,430 billed as a die service charge?

Mr. Duque: Yes, sir.

The Court: All of it?

Mr. Duque: I am quite sure it was. I believe that is what the billing shows. It was billed as a die charge price. Those are the words that were used.

The Court: Was sales tax charged on it?

Mr. Duque: Your Honor, that I do not know. I don't believe that is in evidence, but I am sure that it wasn't.

Mr. Mahoney: No. There is a resale exemption statement, your Honor. You will note on the invoice, on the acknowledgment there is a statement below "exemption."

The Court: There is, but I don't know whether that is as to everything on the invoice or—

Mr. Mahoney: That is as to everything on the invoice, your Honor.

Mr. Duque: There was no sales tax paid, to answer your [373] Honor's question.

Here, your Honor, is the parts proposal that your Honor asked that I refer to.

The Court: What is the exhibit number?

Mr. Duque: Exhibit 15, sir.

The Court: Very well.

Mr. Duque: Then that is paragraph 10 in that exhibit. It says:

"* * * and will be used exclusively for the manufacture of material for the purchaser * * *"

That is a situation where the entire die charge is paid by the purchaser at that time.

The Court: Well, that isn't involved here, is it? This plaintiff wasn't dealing with the parts division, was he?

Mr. Duque: He wasn't, your Honor. But that indicates the type of proposal that goes out from the parts division when a situation occurs, which your Honor says might have occurred here, where they paid for the whole part of the die, where they paid for the entire cost of the die, which they did not do in this case. But, in any event, as I argued yesterday, your Honor, and I again argue today, assuming that there is a contract for the sole and exclusive use of these dies. What is to prevent the defendant from making 10 other sets of identical dies and producing extrusions? What is to [374] prevent him from doing what happened in this case legally. What happened in this case, if the court please, was that the Windsor people and the Panaview people got into a fight and Panaview told Windsor if they didn't do so and so and pay their bills they weren't going to supply doors for them to supply Fuller. Windsor said, "We will take your door and we will break it down and have

it made, have the extrusions made by somebody, and produce the same door."

Now, assuming that there was a sole and exclusive contract, what is to prevent anybody from doing that very same thing with any of these doors that have been out on the market and out in the public domain?

The Court: The plaintiff says nothing, but the plaintiff says that plaintiff furnishes you a certain intellectual property, a creation of the plaintiff, certain drawings from which these dies are made and that if you made any duplicate sets of dies you made them from that drawing and that that is what you had no right to do, to misappropriate the intellectual property of the plaintiff.

Mr. Duque: I understand plaintiff's statement in that connection, your Honor, and there are three answers to it. In the first place, this is not a case to recover damages for a breach or misappropriation of an intellectual property.

The Court: Well, the second cause of action might be twisted into that, might it not? [375]

Mr. Duque: Well, I guess it could be twisted, but as I read it that isn't what it says.

The Court: That wasn't the way it started out, but in view of the rule as to judgments, Rule 54(c), which states:

"Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even

if the party has not demanded such relief in his pleadings."

With that rule in mind, it might.

Mr. Duque: Yes, your Honor, it could very well. However, the facts don't substantiate that. The record here shows that this man had an idea of building a door and he put that door out on the market and he sold it and it was in the public domain. He was producing it, if the court please. This is no secret, unique, literary property right that nobody knows about.

The Court: But he says his drawings were; that the defendant would have had to have gone and reproduced the door or reproduced the dies in some other way; but he says the tort here was in misappropriating plaintiff's literary property by resorting to plaintiff's drawings to produce a duplicate set of dies.

Mr. Duque: If the court please, there is no evidence in the record that we misused his [376] drawings.

The Court: I assume that—well, the stipulation is that the defendant used plaintiff's die tools.

Mr. Duque: That plaintiff used the die tools to produce extrusions for Windsor. But we never misappropriated the drawings. We never disclosed them to anybody else. We never disclosed them to any of his competitors. This was a door, may it please your Honor, that was out on the market. It was brought by Windsor, as is stated in the affidavit of Mr. Sargeant and Mr. Hairston, to the defendant Reynolds Metals Company.

The Court: Your answer to that contention with respect to intellectual property is, as I understand it, that you did not misuse it or misappropriate the drawings; and by the stipulation of facts, you did use the dies.

Mr. Duque: Exactly, your Honor.

The Court: And you did not misuse the drawings. If you misused anything you misused the dies.

Mr. Duque: If we did anything wrong we used the dies to produce extrusions for Windsor. But if this is a wrong it is either a breach of contract or it is some other kind of a wrong. I can't put my finger on what kind of a wrong it would be, because it is done in the business whenever—well, we did not go into the custom and usage in the industry, so I will not argue that.

But my position, in answer to your Honor's question, is [377] that we did not misuse any of their property whatsoever at any time. We disclosed no drawings. We did nothing in the world that was in the least way illegal or immoral of any kind or character. We simply did what every extrusion company in the business does, your Honor. A customer came to us and said, "Here is a door. Will you break it down and make extrusions."

We said yes. So we broke it down and made the extrusions. We found we had a die that would make identical extrusions, so while we were building another set of dies we used that die. And that is what we have done. That is what the record shows.

And if that is a tort or a breach of contract, then we will have to live with it. Insofar as I am concerned, I don't see that there is any breach of the contract. I don't know of any tort that could follow.

The Court: It depends on what the contract was, and that is what I am trying to find. These invoices in Exhibit 21 merely say, as I read them, "die charge." It doesn't say anything more or less.

Mr. Duque: If there was no contract—in other words, if you follow plaintiff's argument, he says paragraph 11 doesn't apply, then there was no contract. If you follow his argument and—

The Court: At least paragraph 11 doesn't apply, but he says paragraph 11 retains the title in the seller, in [378] Reynolds, as to dies and jigs and so forth, produced specifically and solely for the use of the buyer.

Mr. Duque: Yes, your Honor.

The Court: But since you say the defendant here, Reynolds, says, "We didn't make these dies specifically and solely for Panaview's use," and 11 doesn't apply, and that there is no other provision that applies and therefore there must be no contract except a contract, an oral agreement that Reynolds would produce the dies for whatever the figure was, \$1430. In the absence of anything else title passed to the plaintiff, the plaintiff has the title and therefore controls the use. That is plaintiff's argument, as I understand it.

Mr. Duque: If they will pay us the difference

between \$1430, which they paid us, and \$3167, they can have the dies.

The Court: I assume that their answer to that is that it is your business what you charged them, but they want the dies.

Now, where is there any evidence that the plaintiff did anything but buy the dies? The normal transaction would be a sale, wouldn't it?

Mr. Duque: Not when it says a "die charge." I don't think that is a sale. That's a charge, your Honor. A charge doesn't mean a sale, I don't think. I think that would be a somewhat strange construction of the word "charge."

The Court: It states "die charge"? [379]

Mr. Duque: Yes, sir. If it said purchase price of the dies or price of the dies or words to that effect, I could well understand it. But it is the plaintiff's burden, your Honor, to prove a contract, and we have proven by testimony that the charge was a use charge. We have live testimony to that effect—I mean on the witness stand and in the affidavits, testimony to the effect that it was a use charge and that it was not a sale. There is no testimony in the record to contradict that, your Honor. And that being the record, why would it be logical to say that this was a sale when it was simply a charge for the use of the dies, as has been testified to and has been uncontroverted.

The burden is on the plaintiff to prove a contract. They have alleged that paragraph 11 is the contract. If they do not want to rely on that, then they have to rely on some kind of an oral contract.

The Court: I think you both probably want to withdraw from that one, don't you?

Mr. Duque: Well, in any event, your Honor, the plaintiff must prove a contract in this case, and we submit that that has not been done. The alleged conversation in 1948 between Mr. Sargeant and Mr. Grossman, who was then working with Glide, certainly doesn't have any bearing on this action. So we submit, your Honor, that there is no contract for the exclusive use of the dies, whether you use paragraph [380] 11 or whether you do not.

We submit, further, that insofar as the second cause of action is concerned, the alleged breach of trust and confidence, that there has been no trust or there have been no confidences breached by anybody. These people were dealing at arm's length in a business transaction. There is no evidence here that fills the requirement of a breach of trust or a breach of fiduciary relationship. The record is completely silent on that. The only testimony there was in that connection, your Honor, was that Mr. Grossman or Mr. Kavich told—well, Mr. Grossman or Mr. Reznick told Mr. Kavich or Mr. Sargeant that they were coming out with a new door and, "Please don't let our competitors know we are coming out with a new door because it will affect our sales." That is the only evidence that has any bearing on alleged fiduciary relationship, and as I read the cases, your Honor, that doesn't create a fiduciary relationship. The relationship has to be established. It has to be assumed by the party to whom it is given. And we assumed no relationship, trust and

confidence with either Mr. Reznick or Mr. Grossman or with Glide or with Panaview or with Windsor. We were doing business with all of them.

Insofar as the unfair competition is concerned, your Honor, I don't want to belabor the point. The only thing that counsel has brought up in connection with that that is [381] new is that he claimed Section 3369 of the Civil Code makes unfair or fraudulent business practices unfair competition. But that Code section, quite obviously and by the cases, is interpreted for the benefit of the public, not for the individuals that are dealing.

The Court: What do you say to plaintiff's contention that the evidence shows the defendant gave plaintiff unbalanced deliveries and gave them while supplying Windsor with full deliveries?

Mr. Duque: Your Honor, I say two things to that: I say in the first place that this is not an action for breach of contract or for damages for incomplete or unfilled deliveries. There is no such action here. And in the second place their contention hasn't been proven by the evidence in this case. We admit, and Mr. Hairston testified, that there are times in the extrusion business, as in every business, when the delivery schedule falls down. Maybe your plant is only up to 60 per cent on its delivery schedule. But there is no evidence here that we failed to ever fill an order. There is no evidence here that there is any breach in that connection.

Assume that the deliveries were slow. Assume, for the purpose of argument, that there were periods

when the deliveries were slow. We have filled all the orders and there is no evidence here that we are remiss or delinquent [382] in having completed the defendant's orders. That is my answer to that contention of the plaintiff.

Insofar as the unfair competition is concerned, as I stated before, there is no unfair competition. The facts, in the first place, show that Reynolds Metals Company was never in competition with the plaintiff in this case. We did not produce assembled knocked-down doors with all the component parts at any time for anyone, so we were not in competition. In the first place there are none of the elements of unfair competition here, your Honor. There has been no palming off, no secondary meaning acquired as relates to Reynolds Metals Company, or even as relates to Windsor. So all of the elements that are necessary in unfair competition, as I read the law of the State of California, are lacking in this case.

I submit, your Honor, that plaintiff has failed to prove a case, has failed to prove a cause of action, either to prove a contract or a breach thereof or a fiduciary relationship or breach thereof, or unfair competition. And I submit that judgment should be rendered for the defendant and that the motion for preliminary injunction which was continued until the trial, after the hearing, should be denied.

Mr. Mahoney: Your Honor, the defendant here has made a point in both evidence and argument to the effect that [383] there is a disparity between the

charge which was made against the plaintiff for the dies and the alleged actual sums expended on the dies by the defendant. However, this is merely a case of adequacy of consideration and is not relevant here. If the terms of paragraph 11 do not apply it is immaterial what the defendant charged the plaintiff. If the defendant chose to charge the plaintiff 30 cents apiece for the dies that was defendant's prerogative.

The Court: Yes. But as I understand the defendant's point there it is that this is in issue here as to whether or not there was a sale or a mere charge for the use. And the defendant argues that relevant to that issue it is shown without dispute that the only charge made was less than half of the cost, and argues that there was no sale; and, assuming the rest of the argument, it is that the sale would have been more nearly the cost price if there had been a sale.

Mr. Mahoney: Well, your Honor, the defendant has assumed the position that the terms of paragraph 11 do not apply to the dies which were ordered here, and as your Honor very succinctly stated plaintiff's case in that regard, if there is no contract relating to the die charges made, then on the face of it, if the acknowledgments in paragraph 11 do not apply in their terms specifically and solely to these die charges and the dies which are set forth very clearly on the acknowledgment, then the dies are the property of the [384] plaintiff.

The Court: The defendant says, as I understand

it, that the testimony is to the effect that there was a contract for the use, and not a sale.

Mr. Mahoney: Well, your Honor, the testimony here—I am trying to recall the specific testimony which was made. The first point which can be made there is that it was never communicated to the plaintiff in any way whatsoever the fact that the die charge, the actual cost was \$3170, or was in excess of the sum charged to the plaintiff. And there was never any mention, as the defendant has clearly pointed out, there was never any discussion, according to the defendant, as to the use of the dies in one way or another.

The plaintiff relies on paragraph 11. The defendant now says paragraph 11 doesn't apply. The plaintiff says, fine. The plaintiff says, "They are our dies. We paid the money. You have put in evidence nothing to show that there was any other contractual provision which you communicated to the plaintiff regarding the dies. You made a charge. We paid it." The only place where use is discussed is in the acknowledgment.

Now, your Honor, going further, and to show the fact—

The Court: What do you mean by the "acknowledgment"?

Mr. Mahoney: In the contract.

The Court: You mean the only place where use is discussed [385] is in paragraph 11?

Mr. Mahoney: In paragraph 11.

The Court: That is the contract you sue on?

Mr. Mahoney: Yes, we sued on it.

Now, your Honor, pointing to the supplement to the memorandum of points and authorities which was filed by the defendant here, the defendant stated, "Plaintiff must produce evidence of some other agreement for sole and exclusive use if it is to prevail in its contention that the dies were wrongfully used by defendant to produce extrusions for one of plaintiff's competitors."

And then it defines what it thinks the words "any" and "which" signify.

And then it goes on to say, "There are obviously situations in the production of aluminum extrusions, as the testimony in this case will show, where the extruding company does specifically agree to use the dies which it manufactures to produce extrusions for a given customer solely on that customer's order, such as extrusions which are being made for classified material for the Government, etc. * * *"

It is significant, your Honor, that no evidence in that regard was placed in the record, and that the defendant did not support the burden of proof which it set up for itself in its own supplement to its memorandum of points and authorities. [386]

Going further, your Honor, there has been produced here a document which contains the terms of the contract relating to the parts department. Now, it has been clearly pointed out in the evidence that the parts department and the extrusion division of Reynolds Metals Company operate as two separate and distinct entities. The introduction of what the contract of the parts department says has no relevance to the contractual situation as relates

to the extrusion department. As a matter of fact, there is no proof here that the parts department in any way makes any extrusion dies.

Now, your Honor, there has not been placed in evidence here in any way whatsoever any other form of alternative contractual agreement relating to sole and exclusive use of dies for which die charges have been made, and which have been made specifically and solely for the order of the customer, other than paragraph 11. And it is submitted that the defendant must choose the horn on which it will be impaled. It must either choose to go along with the plaintiff's contention that the language of paragraph 11 means a die for which a die charge was made and which was paid, or fall under the sole and exclusive use provisions of paragraph 11; or that if the defendant wants to maintain its position that there was no sole and specific manufacture, paragraph 11 has no relevance to the dies which are listed on the acknowledgment and that the dies—a die charge price—[387] that's another thing that should be pointed out to your Honor. While "die charge" is included on the acknowledgment, the column under which the money is set forth says, "Price."

Now, if there was no contract as to exclusive use and retention of ownership, then a price was paid; and whether there was a price which was identical or commensurate with that money which was expended on the manufacture of dies is irrelevant, it is well established in contract law that a contract can be made. One consideration which is disparate

in value with another can be exchanged between the parties.

There does not appear anywhere in the acknowledgment and the orders the term "die service charge." The term "service charge" is a phrase which is used by other extruders in the field.

Now, the defendant here has conceded the use of the plaintiff's dies, but it points out that Mr. Hairston has testified that there were duplicate sets of dies. Now, as your Honor may or may not know, it is customary in the trade to manufacture duplicate sets of dies for various purposes.

The Court: In view of the stipulation of facts that the dies made for the plaintiff were used in the preparation of a duplicate set, it is immaterial, isn't it?

Mr. Mahoney: That is the way we feel exactly, your Honor. But since this was brought up in argument we felt [388] it should be answered.

Anyway, there is no evidence when the duplicate set was made. There is no evidence when its use was initiated. And there is no evidence as to whether any attempt was made to restrict the use of the duplicate set to Reynolds production for its own parts department and to restrict the use of the Panaview dies solely for Panaview doors. It is our contention that, as your Honor has succinctly stated, in view of the stipulation this is not material here.

Now, counsel for the defendant has repeatedly stated that there is no evidence here that any of the employees, agents or officers of the Reynolds Metals Company disclosed the contents of the drawings

which were submitted, Plaintiff's Exhibit No. 6, to the defendant. But this is not the gist of the plaintiff's complaint. What the gist of plaintiff's complaint is is that the defendant misused the drawings by taking the drawings as the parent and the dies as the child and misusing the dies by producing for its own account, for its parts division, the extrusions for utilization by the parts division. We don't contend, and we have not—it is conceded—placed any evidence in the record that either Mr. Sargeant or Mr. Kavich went around and told anybody else about the details of the drawings which were disclosed. This is a question of internal misuse and internal misappropriation. [389]

Now, there has been some discussion on the question of fiduciary relationship here; the statement being made that there was no expressed agreement by the defendant that it would keep any drawings submitted to it by the plaintiff in confidence. However, there were decisions of the Court which hold that there need not be an express statement that there is an intent to establish a fiduciary relationship and that such a fiduciary relationship may be implied from the facts and circumstances of the transactions.

Here the plaintiff took its drawings to the defendant. The defendant took the drawings from the plaintiff and made dies therefrom to its profit and benefit because it was able then to sell what has been established to be huge numbers of extrusions, and huge volumes so far as price is concerned. The figures which have been placed in evidence show that

alone the defendant has sold approximately \$150,000 worth of materials through its parts department to Windsor Supply Company, which is indicative of the tremendous inducement available to the defendant to violate its contract and to breach his fiduciary obligation.

Now, so far as the contentions of plaintiff regarding Reynolds' manufacture of extrusions for Windsor Supply are concerned, plaintiff wishes to point out that it was Reynolds' action in going behind the back of the plaintiff in negotiating with the officers of Windsor Supply Company that [390] enabled Windsor Supply to break its relationship with the plaintiff and to immediately set up in business. If the practice which your Honor has previously adverted to were followed wherein the door was bona fide brought in, wherein the extrusions were taken apart, measured, dies made therefrom, your Honor has previously taken judicial notice that this would take a long period of time because of the natural difficulties of the situation.

And it has been pointed by Mr. Meyer, the defendant's own witness, even where the very party who created the idea came into Reynolds Metals, who were experts on the extrusion of materials, there was a certain amount of running back and forth to determine what the tolerances would be and what would be done. All of these things would be magnified tremendously in scope if Reynolds had actually taken the door and followed the procedures which your Honor has suggested as alternative modes of procedure.

It is submitted therefore, your Honor, that the plaintiff has made its case for the breach of contract by the defendant in using the dies of the plaintiff, when it has already conceded such use; that it has breached its fiduciary obligation by using the product resulting from its confidential disclosure of drawings to the defendant; and that it has unfairly and fraudulently dealt with the plaintiff by deliberately and with malice aforethought establishing itself as [391] a supplier to a competitor who was in direct competition with the plaintiff.

The Court: Is there anything further? If not, it will stand submitted, gentlemen, both the motion and the case after trial.

The Clerk: Your Honor, Plaintiff's Exhibits 9-A, B, C and D for identification were to be returned at the conclusion of the trial.

The Court: Those are Mr. Oldenkamp's files, Exhibits 9-A, B, C and D for identification.

Mr. Duque: I beg your pardon?

The Court: Mr. Mahoney, Exhibits 9-A, B, C and D for identification are files of Mr. Oldenkamp.

Mr. Mahoney: We have contracted with Mr. Oldenkamp, that is plaintiff's attorneys, to see that they are returned to him, and if they will be released to the custody of plaintiff's attorneys they will see that he gets them back.

The Court: Very well. The clerk will release them to your custody.

Mr. Mahoney: Thank you.

The Court: Anything further, Mr. Clerk?

The Clerk: That is all, your Honor.

The Court: Very well. The case will stand submitted.

(Whereupon, the above-entitled matter was concluded.) [392]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 2nd day of March, 1956.

/s/ DON P. CRAM,
Official Reporter.

[Endorsed]: Filed March 5, 1956.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 73, inclusive, contain the original

Compliant;

Answer;

Affidavit of Frank K. Miles (Exhibit A);

Affidavit of Harry M. Sargeant (Exhibit C);

Affidavit of William O. Yates (Exhibit E);

Affidavit of James M. Hairston (Exhibit B);

Affidavit of O. J. Meyer, Jr. (Exhibit D);

Stipulation of Facts (Exhibit 1);

Plaintiff's Objections to Defendant's Proposed Findings of Fact;

Findings of Fact and Conclusions of Law;

Judgment for Defendant and Order Denying Injunctive Relief;

Notice of Appeal;

Designation of Record for Appeal;

Points on Appeal;

Designation of Additional Parts of Record on Appeal;

Affidavit for Order Under Rule 73(g) Extending Time;

which together with the original Defendant's Exhibits A through K, inclusive; Plaintiff's Exhibits 1, 2, 5, 6, 11, 12, 13, 14, 21, 24, 25, 26 and 27; and 4 volumes of reporter's transcript; in the above-entitled cause constitute that transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in said cause.

I further certify that my fees for preparing the foregoing record amount to \$2.00, which sum has been paid by appellant.

Witness my hand and the seal of said District Court, this 8th day of March, 1956.

[Seal]

JOHN A. CHILDRESS,
Clerk;

By /s/ CHARLES E. JONES,
Deputy.

[Endorsed]: No. 15059. United States Court of Appeals for the Ninth Circuit. Panaview Door & Window Co., a Corporation, Appellant, vs. Reynolds Metals Company, a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed March 9, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals,
Ninth Circuit

No. 15059

PANAVIEW DOOR & WINDOW CO.,
Plaintiff and Appellant,

vs.

REYNOLDS METALS COMPANY,
Defendant and Appellee.

NOTICE UNDER RULE 17(6) OF THE NINTH
CIRCUIT COURT OF APPEALS

To the Clerk, Honorable Paul P. O'Brien:

Appellant hereby presents the following concise statement of points on appeal and its designation of the parts of the record material to this appeal, pursuant to subdivision 6 of Rule 17 of the rules of this Court, to wit:

Points on Appeal

1. The trial court should have sustained each and every objection filed by plaintiff to the proposed findings of fact.
2. The findings are not supported by the evidence and are erroneous as a matter of law in that they find that the dies in question were not made solely for plaintiff's use under the contract.
3. The trial court violated the rule that any uncertainty in the contract should be construed against defendant who drafted the contract.

4. The findings were contrary to the judicial admissions of defendant that the dies were governed by paragraph 11 of the contract.

5. The trial court erred in its holding that plaintiff failed to establish by a preponderance of the evidence that defendant had breached its relationship of trust and confidence with the plaintiff by utilizing the work product of plaintiff disclosed to defendant in confidence to manufacture dies on plaintiff's order and by subsequently utilizing said dies for its own profit and benefit to the injury and harm of plaintiff, since no evidence to the contrary was placed in the record by the defendant.

6. The trial court erred in its holding that plaintiff had failed to establish by a preponderance of the evidence that defendant unfairly competed with plaintiff by offering to sell and selling to customers of plaintiff products manufactured by the use of information disclosed to defendant by plaintiff in trust and confidence, since no evidence to the contrary was placed in the record by the defendant.

Dated this 14th day of March, 1956.

THOMAS P. MAHONEY and
MACBETH & FORD,

By /s/ PATRICK H. FORD,
Attorneys for Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed March 16, 1956.

